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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. 1007.

WILLIAM A. COLE, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

FILED SEPTEMBER 13, 1893.

(15,391.)

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INDEX.

	Original.	Print.
Caption	1	1
Indictment	1	1
Motion to quash indictment	9	7
Order overruling motion to quash indictment	11	8
Charge of the court	11	8
Judgment	16	11
Order overruling motion for new trial	16	11
Sentence	17	12
Petition for writ of error	18	12
Writ of error bond	19	13
Writ of error	21	15
Citation	22	15
Motion to allow supersedeas and bail	23	16
Order on supersedeas and bail	23	17
Order allowing 10 days to file exceptions	24	17
Stipulation as to filing papers	24	18
Assignment of errors	25	18
Bill of exceptions No. 1	38	26
Motion to quash indictment	38	27

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	Original.	Print.
Bill of exceptions No. 2	39	27
Contract between Royal Publishing Company and B. F. Sherrouse, July 7, 1892	39	27
Solicitor's guarantee contract	43	29
Contract between Royal Publishing Company and Wm. Bruce, April 18, 1892	46	31
Contract between Royal Publishing Company and F. S. Howell, December 9, 1891	49	32
Statement of evidence	52	34
Bill of exceptions No. 3	64	41
Statement of evidence	64	42
Bill of exceptions No. 4	69	45
Statement of evidence	69	45
Bill of exceptions No. 5	71	46
Statement of evidence	71	46
Bill of exceptions No. 6	73	47
Statement of evidence	73	47
Bill of exceptions No. 7	74	48
Statement of evidence	74	48
Bill of exceptions No. 8	75	48
Statement of evidence	75	48
Letter of W. A. Cole, August 13, 189–	75	49
Statement of evidence	77	49
Bill of exceptions No. 9	78	50
Statement of evidence	78	50
Bill of exceptions No. 10	79	50
Statement of evidence	79	51
Bill of exceptions No. 11	80	51
Statement of evidence	80	51
Bill of exceptions No. 12	81	52
Charge to jury and exceptions	81	52
Bill of exceptions No. 13	82	52
Charge to jury and exceptions	82	53
Charge to jury	84	53
Bill of exceptions No. 14	89	56
Charge to jury and exceptions	89	56
Bill of exceptions No. 15	89	56
Charge to jury and exceptions	89	57
Bill of exceptions No. 16	90	57
Charge to jury and exceptions	90	57
Bill of exceptions No. 17	91	57
Charge to jury and exceptions	91	58
Bill of exceptions No. 18	91	58
Exceptions to charge	91	58
Statement of evidence	92	58
Judge's certificate to bill of exceptions	93	58
Application for extension of time in which to return writ of error	94	59
Order extending time in which to return writ of error	94	59
Clerk's certificate	95	60

1 UNITED STATES OF AMERICA, }
Northern District of Texas. }

Be it remembered that at a regular and stated term of the district court of the United States for the northern district of Texas, begun and holden at Waco, in said district, on the 10th day, it being the second Monday, of April, A. D. 1893—Hon. John B. Rector, district judge, presiding—in the case therein pending, numbered on the criminal docket of said court 296, and entitled "The United States, plaintiff, *vs.* Wm. A. Cole, defendant," the following proceedings were had and the following papers filed:

Indictment.

THE UNITED STATES OF AMERICA, }
Northern District of Texas, } *To wit:*

In the District Court of the United States within and for the Northern District of Texas.

In the name and by the authority of the United States of America, the grand jurors of the United States within and for the district aforesaid, at Waco, Texas, in said district, duly selected, impanelled, sworn, and charged to inquire into and true presentment make of all crimes and offenses cognizable under the authority of the United States committed within said northern district of Texas, upon their oaths present in open court that on the seventeenth (17th) day of June, A. D. eighteen hundred and ninety-two (A. D. 1892), and prior thereto one W. A. Cole, at Temple, in the county of Bell, within the district aforesaid, devised a scheme and artifice to defraud divers persons of their money and property, said scheme and artifice to defraud to be then and there effected by him, the said W. A. Cole, under and in the name of the Royal Publishing Co., by then and there feloniously and fraudulently opening and intending to open correspondence and communication with various and divers persons resident
2 within the United States by means of the Post Office establishment of the United States, and by then and there unlawfully and feloniously and fraudulently inciting such persons to open correspondence and communication and to correspond & communicate with him in his own name and under the name of the Royal Publishing Co. by and through the United States mail; which said scheme and artifice to defraud then and there was that the said W. A. Cole, in the name of the Royal Publishing Co. and as agent therefor, would advertise in divers newspapers for a man to manage a lucrative business at a compensation of twelve hundred dollars ($1,200) per year and a share in the profits of said business, and by means of such advertisements induce such other parties to write to him, the said W. A. Cole, in relation to said pretended employment and business, and by other letters and corre-

spondence, written in the name of him, the said W. A. Cole, and the Royal Publishing Co., induce such persons so desiring such employment to come to the office of him, the said W. A. Cole, at Temple, in Bell county, Texas; that when said persons would so come to said Cole's office, in Temple, Texas, he would then and there represent to such persons that the said Royal Publishing Co., of which and for which he then and there gave himself out to be the general agent, and that he, as such general agent of the Royal Publishing Co. and for and in behalf of the said Royal Publishing Co., desired to employ such persons to act as general agent- for said Royal Publishing Co. for the term of one year, at various places, to wit, the territory covering southeast Texas, the States of Louisiana, Mississippi, Alabama, and Tennessee, upon a salary of one hundred dollars ($100.00) a month, for the sale of books and publications of the said Royal Publishing Co. through and by means of solicitors and road agents thereafter to be appointed by such general agents, which said salary of
3 one hundred dollars ($100.00) per month the said W. A. Cole would represent and represented to the said persons whom he so solicited to become general agents as aforesaid was to be paid to the said general agents by him, under the name of the said Royal Publishing Co., on the condition, among other things, that such general agents so to be employed should carry a large stock of the goods and publications of the Royal Publishing Co. to supply solicitors and road agents, who would thereafter operate under their supervision—that is to say, the supervision of the general agents; that said persons would carry from time to time a one-thousand-dollar ($1,000.00) stock of goods at retail prices to supply the trade, and that said stock would be invoiced and billed to such persons at sixty per cent. of the retail price thereof, and would appoint at least ten solicitors and road agents each month upon the terms and requirements of what was called and represented to be "solicitors' guarantee contracts," which said "solicitors' guarantee contracts" were to be thereafter supplied to such general agents by the said Royal Publishing Co., and that the employment of the said solicitors and road agents was to constitute one month's work, for which the aforesaid sum of one hundred dollars ($100.00) was to be paid; that such general agents, so appointed, were to solicit and appoint suitable solicitors and road agents for the sale of the books and other publications of the said Royal Publishing Co., and that the office expenses of such general agents would be paid by the said Royal Publishing Co.; that such general agents so to be employed for the aforesaid sum of one hundred dollars ($100.00) per month were to devote their time and attention diligently and faithfully to securing and instructing the said road agents and solicitors and to establish and appoint not less than ten road agents and solicitors each month upon the terms and requirements of the "solicitors' guarantee contract" that would be supplied to such general
4 agents; that at the same time the said W. A. Cole, under the name of the Royal Publishing Co., would also represent and pretend to such persons so solicited and induced to become general

agents that the "solicitors' guarantee contract-" above referred to were to be contracts with such persons as were to be engaged by such general agents as road agents and solicitors, by the terms of which the said road agents and solicitors were to receive a commission on the sales of the publications of the said Royal Publishing Co. in the sum and amount of forty per cent. (40) of the gross amount of said sales, and that such commission would be fixed upon the retail price of the said books and publications and only allowed and paid after the said general agents would have received sixty per cent. of said retail price of the said books and publications for their services as such road agents, and that such road agents and solicitors would receive from the said general agents the sum of three dollars ($3.00) per day if the said road agents and solicitors had canvassed in his territory the full number of twenty-six (26) days and it was found that his commission would not average — per day for each full day actually spent in soliciting orders for said books and publications.

And the grand jurors aforesaid further present that as a part of said fraudulent scheme and artifice to defraud so devised the said W. A. Cole would and did conceal from such persons so solicited to become general agents the real terms of the "solicitors' guarantee contract" required to be obtained by such general agents as a condition precedent to their receiving any salary or compensation from the said W. A. Cole under the name of the Royal Publishing Co., and falsely represented to such persons so solicited to become general agents that said "solicitors' guarantee contracts" were of the form and on the conditions requiring no deposit or prepayment
5 of money from the road agents and solicitors to be employed by such general agents; that having obtained from the person- so solicited to become general agents large sums of money for the right to become general agents and also on account of the stock of goods, to wit, books and publications, from the said Royal Publishing Co. which were to be sold by such general agents under and through and by means of the road agents and solicitors to be employed under the "solicitors' guarantee contract" herein referred to, and after having induced such persons to become general agents of the said W. A. Cole, under the name of the Royal Publishing Co., would then and there demand and obtain and receive a large sum of money, to wit, the sum of, to wit, six hundred dollars ($600.00) each, as a deposit and guarantee of good faith on the part of said general agents to carry out the terms and conditions of such employment, and after said deposit had been so made by such agents with him he, the said Cole, under the name of the Royal Publishing Co., would then show and deliver to the person- so solicited and engaged as general agents the form of the "solicitors' guarantee contract," which the said W. A. Cole, under the name of the Royal Publishing Co., required such general agents to obtain from the solicitors and road agents to be employed by them, and without obtaining ten of which road agents and solicitors each month such general agents were not entitled to receive the sum of one hundred dollars per month, as hereinabove stated, or any other sum; that

by the terms of which said "solicitors' guarantee contracts" so supplied, shown, delivered, and required such persons so to be engaged as general agents by the said W. A. Cole, in and under the name of the Royal Publishing Co., — is made a condition precedent to the employment of said solicitors and road agents that each of them should deposit with such general agents so employed the sum of fifteen ($15.00) dollars as a so-called guarantee of
6 good faith, and before signing the said "solicitors' guarantee contracts" for a complete outfit of the works and publications of the Royal Publishing Co., out of which said sum of fifteen ($15.00) dollars so to be deposited by the said road agents and solicitors, and from no other source whatever and from no other means whatever, the said sum of one hundred dollars ($100.00) per month was to be paid to such general agents; and that while it was pretended in said "solicitors' guarantee contract" of the said road agents and solicitors that the said sum of fifteen ($15.00) dollars was a deposit which was to be paid back to the parties depositing it, in truth and in fact, under the terms of the said "solicitors' guarantee contract," the said W. A. Cole intended that no part of the said sum of fifteen dollars should ever in fact be paid back and returned to the parties so depositing it, he, the said William A. Cole, then and there well knowing that road agents and solicitors could not be obtained under the terms of the so-called solicitors' guarantee contract by said general agents; all of which said scheme being then and there fraudulent and a device to entrap such persons into the payment to him, the said Cole, under the name of the Royal Publishing Co., large sums of money, and that in truth and in fact various and divers persons were entrapped into paying large sums of money and large sums of money were extorted from such persons as would enter into contracts with the said W. A. Cole, under the name of the Royal Publishing Co., of which he then and there held himself out to be the general agent, he, the said W. A. Cole, then and there well knowing that such persons could not procure and employ such road agents and solicitors at and on the terms in the so-called "solicitors' guarantee contract," and that they, the said general agents, could not dispose of the stock of goods at retail prices or at all, and not intending to then
7 and there pay said persons so employed as general agents the said sum of one hundred dollars ($100.00) per month or any other sum of money whatever per month, and that in truth and in fact he, the said W. A. Cole, under the name of the Royal Publishing Co., was not and the Royal Publishing Co. was not then and there a dealer in books and publications, and that said scheme so devised by the said W. A. Cole was not in truth and in fact intended as a plan to dispose of any stock of books and other publications of himself and belonging to himself, but that the same was then and there a scheme to extort money from such persons as he, the said W. A. Cole, under the name of the Royal Publishing Co., might and could induce to become general agents for the sale of certain worthless and valueless and unsalable works and publications at prices fixed by him, the said W. A. Cole, under the name

of the Royal Publishing Co., so high that the same could not be sold by the "solicitors and road agents" under the "solicitors' guarantee contract," such as, to wit, a certain publication then and there known as "Wild Life on the Plains" and "Horrors of Indian Warfare," and a certain other book and publication known as "Horrors and Great Disasters in the World's History."

And the grand jurors aforesaid do further say that it was then and there part and parcel of the said scheme to defraud for the said W. A. Cole, under the name of the Royal Publishing Co., to so use the Post Office establishment in effecting the purposes and objects thereof by and through correspondence as aforesaid with such persons as might live and reside at a great distance from the city of Temple, and that said advertisements, by means of which he, the said Cole, incited the correspondence of such persons as he intended to defraud, as hereinbefore set forth and described, were published from time to time in certain newspapers published in certain cities in the United States, to wit, the city of New Orleans, in the State of Louisiana; in the city of Houston, in the State of Texas,
8 and in the city of St. Louis, in the State of Missouri.

And the grand jurors aforesaid do further present that the said W. A. Cole, having so devised and intended to devise the said scheme and artifice to defraud, as above set forth and described, *to defraud* divers and other persons as aforesaid, the same being then and there a scheme and artifice to defraud, to be then and there *affected* by him, the said Cole, in opening and intending to open correspondence and communication with divers persons as aforesaid, and with one B. F. Sherrouse by means of the Post Office establishment of the United States as aforesaid, and by then and there inciting such other persons and the said B. F. Sherrouse to open correspondence and communication with him, the said W. A. Cole, by and through the United States mail, did unlawfully and feloniously, on the seventeenth (17) day of June, A. D. 1892, at Temple, in the county of Bell, within the district aforesaid, unlawfully and feloniously and in and for executing the aforesaid scheme and fraud and attempting to execute the same and in pursuance thereof, place and caused to be placed then and there in a certain post office, to wit, the post office at Temple, in the county of Bell, in the district aforesaid, a certain letter, the envelope of which was then and there directed to him, the said B. F. Sherrouse, in the words and figures following, to wit: "Mr. B. F. Sherrouse, 520 Magazine St., New Orleans, La.," which said letter and envelope was then and there postmarked in the words and figures following, to wit: "Temple, Jun- 17, 9 p. m., '92, Tex.," which said letter was then and there in the words and figures following, to wit:

References: Temple National bank, Yancey & Branch, the Temple Times, T. L. Hollingsworth, A. F. Bentley, and leading merchants.

Office of W. A. Cole, publisher of standard subscription books, Kyle building, corner of Twelfth St. and Ave. E.

TEMPLE, TEXAS, *June 17th*, 1892.

9 Mr. B. F. Sherrouse, New Orleans, La.

DEAR SIR: Yours of the 15 is to hand, and in reply will say that the capital on your part would not be less than $600, and in a city like yours we would like a much larger stock than that; $600 will carry a $1,000 stock. We pay all the expenses of running the office, etc.

We experience no trouble whatever in securing plenty of good agents, as we guarantee them from 2 to $3 per day.

We sell very few goods on a credit; in fact, we sell none that way unless we have good security. We do enough advertising to make the business pay. We did not exag-erate about your being able to sell from two to four thousand dollars' worth per month, for we are making the statement from actual experience.

We have no set form of contract, hence cannot send you one, but our letter contained the sum and substance of what we would hope to incorporate in a contract, and the main reason for wanting you to come to the office is that you may have a full and satisfactory understanding of the business.

We are anxious to open this office as soon as possible, and hope you will come at once and bring references with you. Wire us when you can be here.

Yours truly, W. A. COLE.

Which said letter was then and there intended to be conveyed by mail and was then and there so conveyed by mail and delivered from the post office in the city of New Orleans, in the State of Louisiana, to one B. F. Sherrouse with the intent of him, the said W. A. Cole, then and there to defraud the said *said* B. F. Sherrouse, he, the said W. A. Cole, then and there well knowing that said letter was so mailed and caused to be mailed as aforesaid, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

L. R. WADE,
Foreman of Grand Jury.

Endorsed: No. 296. The United States *vs.* William A. Cole. Charge: Using United States mails to defraud. Presented and filed in open court this 3 day of Dec., 1892. J. H. Finks, clerk, by C. A. Richardson, deputy. A true bill. L. R. Wade, foreman of grand jury. Eugene Marshall, United States attorney, northern dist. of Texas.

Motion to Quash Indictment.

In District Court of the United States within and for the Northern District of Texas.

THE UNITED STATES
vs.
W. A. COLE. } No. 296.

10 Now comes the defendant, by counsel, and, demurring and excepting to the sufficiency of the indictment herein, says same is insufficient in law to require this defendant to plead thereto for the following reasons:

1st. Because said indictment charges no offense against the laws of the United States.

2nd. Because the sundry matters alleged in the indictment concerning advertising done by the defendant, concerning contracts of various kinds, concerning compensation to be paid to agents of different kinds in the conduct of defendant's business, and concerning actual contract entered into between the defendant and B. F. Sherrouse, made on personal conference, all set forth in detail in the indictment, are not shown, even if a fraudulent purpose was intended thereby on the part of the defendant, to have taken place by or through the use of the mail service of the United States, and therefore said alleged acts are not brought within the influence of any of the penal enactments of the United States and cannot serve as the basis for a criminal prosecution.

3rd. Because the only letter of the defendant to Sherrouse, the party alleged to have been defrauded, as set forth in the indictment, and alleged to have been confided to the mails of the United States, carries with it no implication of an attempt to defraud Sherrouse, and, as such letter is the gist of the offense, the same (it being the only alleged matter confided by defendant to the mails) should, in order to constitute an offense, plainly and solely indicate a fraudulent purpose on its face, and not be left to doubt or intendment as to its meaning by either evidence or judicial construction.

Wherefore defendant prays that his said exceptions be sustained, and that the indictment herein be quashed.

JNO. L. DYER,
Attorney for Defendant, W. A. Cole.

Filed Ap'l 11th, 1893,

J. H. FINKS, *Clerk*,
By C. A. RICHARDSON, *Deputy.*

11 *Order Overruling Motion to Quash.*

THE UNITED STATES
vs.
WM. A. COLE. } No. 296.

THURSDAY, *April 13th*, 1893.

On this day came on to be heard the defendant's motion to quash the indictment in this case, and the court, after hearing said motion and the argument of counsel thereon, orders that the same be and it is hereby overruled.

Charge of the Court.

UNITED STATES
vs.
WILLIAM A. COLE. } 296.

The jury are instructed as follows:

The indictment charges that the defendant devised a scheme to defraud, to be effected by him in the name of the Royal Publishing Company, by opening and intending to open correspondence with various persons by means of the Post Office establishment of the United States, and by then and there inciting such persons to open correspondence with him in his own name and in the name of the Royal Publishing Company by and through the United States mail. The indictment further charges that in executing said scheme or artifice the defendant placed and caused to be placed in the post office at Temple, Texas, a letter, the envelope of which was directed to B. F. Sherrouse in words and figures as follows, to wit: Mr. B. F. Sherrouse, 520 Magazine St., New Orleans, La. Then follows the letter fully set out, upon which the indictment in this case is founded.

2. The indictment then, by way of inducement, sets out substantially the contract that defendant, in the name of the Royal Publishing Company, made with some of the general agents employed by him, and then charges that Cole, the defendant, as part of the fraudulent scheme charged in the indictment, concealed from

12 persons solicited to become general agents the real terms of the "solicitor's guarantee contract," required to be obtained by general agents as a condition precedent to their receiving any salary from W. A. Cole under the name of the Royal Publishing Company, and falsely represented to the persons solicited to become general agents that the said solicitor's guarantee contract required no deposit of money from the solicitors to be employed by such general agents; that, having obtained from the person- solicited to become general agents large sums of money for the right to become such general agents and on account of the stock of goods, to wit, books and publications from the Royal Publishing Company which were to be sold by such general agents by means of the solicitors to

be employed under the solicitor's guarantee contract, and after having induced such persons to become general agents, the said W. A. Cole would then and there demand and receive large sums of money, to wit, $600.00, from each of said general agents as a deposit and guarantee of good faith on the part of the general agent to carry out the terms and conditions of the employment, and, after such deposits had been made by such agents with him, he, the said Cole, under the name of the Royal Publishing Company, would then show and deliver to the person so solicited and engaged as general agent the form of the solicitor's guarantee contract required of such general agents to obtain from the solicitors to be employed by them, and without obtaining ten of which solicitors each month such general agents were not entitled to receive the sum of $100.00 per month, as stipulated in his contract with the Royal Publishing Company, or any other sum.

That by the terms of the solicitor's guarantee contract, which the general agents were required to use in making contracts with solicitors, each road agent and solicitor had to deposit with the general agent $15.00 as a guarantee of good faith and for an
13 outfit to work, and that out of this $15.00 deposit of each of the solicitors employed by the general agent he was to get his salary of $100.00 per month, and that while the solicitor's guarantee contract pretended the $15.00 was to be paid back to the agent depositing it the said Cole intended that no part of it should be paid back to the party depositing it; that said Cole well knew that solicitors and road agents could not be obtained under the terms of the solicitor's guarantee contract by general agents.

2*a*. The indictment further charges that the said scheme devised by defendant Cole was not in truth and in fact intended as a plan to dispose of a stock of books belonging to himself, but that the same was a scheme to extort money from such persons as he, the said W. A. Cole, under the name of the Royal Publishing Company, might and could induce to become general agents for the sale of certain worthless and valueless and unsaleable books and publications as prices fixed by him, the said defendant, under the name of the Royal Publishing Company, so high that the same could not be sold by the solicitors and road agents under the solicitor's contract.

Was it a false scheme and plan devised not for the sale of books, but to entrap people to become general agents and deposit large sums of money with Cole, the defendant, which was not returned or intended to be returned to such general agents, or was the plan or scheme an honest one to sell books through agents? That it was a bad plan or poorly adapted to effect and carry out a successful business, if such was the case, would not make it a scheme to defraud if it was honest. But if the leading purpose of the plan was to get possession of large sums of money from general agents and appropriate it dishonestly, then the scheme was one to defraud.

2*b*. The form of the contracts made with the general
14 agents are in evidence before you; also the form of "solicitors' *gau*rantee contract." It seems to the court that if there

was a scheme to defraud, it will be looked for in this case in the fact that the general agents were to get a salary of one hundred dollars per month, besides commissions, and that it practically was to come largely out of the deposits of fifteen dollars to be made by each agent and solicitor employed by the general agent, of which there was to be so employed by each gen'l agent ten a month. Now, if defendant concealed the nature of the solicitor's guarantee contract from such general agents and particularly the requirements therein that each solicitor was to deposit $15.00 with him, the general agent, as a prerequisite of his, the solicitor's, employment until after such general agent had deposited with the defendant Cole $500.00 or $600.00 and such concealed requirement destroyed the capacity of the general agent to go on with his contract and resulted in the forfeiture and loss of his $500.00 or $600.00, and that such result was designed by defendant, then we think the jury could properly find that there was a scheme to defraud, but if there was no such concealment by Cole from the general agents of the solicitor's contract and particularly of the requirements of $15.00 to be paid by each solicitor and road agent; if the contracting agents inspected or had a fair chance to inspect their contracts before depositing their money, then there is nothing on the face of the contracts necessarily implying a scheme to defraud, and if a scheme to defraud existed on the part of defendant it is to be found in the mode and plan of carrying on the business as indicated above and not in the contract set up.

3rd. If the Royal Publishing Company of St. Louis had concocted a scheme to defraud and said scheme was the same as that charged in the indictment, and the defendant, knowing such scheme, connected himself with it and under the name of the Royal Publishing Company in executing said scheme sent out letters and pamphlets through the post office, then in the eye of the law he devised said scheme.

4th. If the defendant sent the letter set out in the indictment through the post office in execution of a scheme to defraud devised by him and to be effected by opening a correspondence with any person by means of the post-office establishment of the United States, then it would make no difference whether the letter disclosed the scheme on its face or was innocent and harmless on its face.

5th. You are the exclusive judges of the evidence, notwithstanding any opinion expressed by the court, and you will regard all the evidence the court has admitted touching the deposit of money by various persons other than Sherrouse, and the contracts of other persons than Sherrouse as general agents with the defendant or with the Royal Publishing Company, through Cole as agent, were admitted solely for the purpose of enabling the jury to determine whether the defendant had concocted a scheme to defraud or was carrying on the business of a book dealer in good faith; and, as bearing on the question whether there was or was not a scheme to defraud, the contract- with general agents other than Sherrouse, made by defendant, are to be considered, as well as that with Sherrouse.

6th. The defendant has shown a good character in Temple for honesty. Good character is no defense if the testimony satisfies you that the defendant is guilty. It is only where the testimony leaves the minds of the jury balanced or in doubt as to the guilt of the defendant that good reputation for honesty is to be taken in consideration by the jury as affording a presumption in favor of innocence.

7th. If you have reasonable doubt as to the guilt of the defendant you will aquit him. If you find the defendant guilty you will say, "We, the jury, find the defendant guilty as charged in the indictment."

JOHN B. RECTOR, *Judge.*

16 Filed April 29, 1893.

J. H. FINKS, *Clerk.*

Judgment.

UNITED STATES } 296. Charge: Using United States Mail to Defraud.
vs.
WM. A. COLE. }

On this 25th day of April, A. D. 1893, this case being called for trial, came the United States, by its district attorney, Eugene Marshall, Esq., and the defendant in person and by attorneys, and both parties announced ready for trial; whereupon came a jury of good and lawful men, to wit, John Boyd, W. R. Peters, C. L. Fields, J. L. Leveritt, Z. T. Allman, T. K. Matthews, T. M. Ward, C. K. Hudson, R. T. Hunter, R. L. Hamilton, Joel Fisher, and Joe Green, who were duly selected, empanelled, and sworn to try this cause. The indictment was read and the defendant entered thereto a plea of not guilty; and the jury, having heard the indictment read, the defendant's plea, the evidence, argument of counsel, and charge of the court, retired on the 29th day of April, 1893, to consider their verdict, and thereafter, on the same day, returned into open court the following verdict, to wit:

We, the jury, find the defendant guilty as charged in the indictment.

JOEL FISHER, *Foreman.*

And the court, having received said verdict, orders that it be filed and entered. It is therefore adjudged by the court that the defendant, Wm. A. Cole, is guilty as charged in the indictment, and it is ordered that he be remanded to the custody of the marshal to await the sentence of the court.

Order Overruling Motion for New Trial.

UNITED STATES } 296.
vs.
WM. A. COLE. }

On this 1st day of May came on to be heard the motion of the defendant for a new trial, the United States appearing by its

17 district attorney and the defendant, Wm. A. Cole, appearing by counsel, his appearance in person being expressly waived by counsel in open court; and the court, having heard said motion and the argument of counsel thereon, doth order and adjudge on this 2nd day of May, 1893, that the said motion for a new trial be, and the same is hereby, overruled; to which ruling of the court defendant in open court, by counsel, excepts.

Sentence.

UNITED STATES } 296. Charge: Having Devised a Scheme to Defraud, to be Effected by Using the Mails of the United States.
vs.
WM. A. COLE. }

On this 3rd day of May, A. D. 1893, the marshal brought into open court the defendant, Wm. A. Cole, in his own proper person, to receive his sentence; whereupon the said Wm. A. Cole was asked by the court if he had anything to say why sentence should not now be pronounced against him, and he here now in open court says nothing. It is therefore adjudged by the court that William A. Cole is guilty of having devised a scheme to defraud, to be effected by using the mails of the United States, as charged in the indictment and as found by the verdict of the jury; and it is ordered by the court that the defendant, W. A. Cole, be, and he is hereby, sentenced to confinement in the county jail for the term of six months and to pay a fine of one hundred dollars and all costs of this case; and it is further ordered that the clerk of this court issue a writ of commitment, directed to the marshal of this district, commanding him to deliver the said Wm. A. Cole to the jailer of the county jail of —— county, Texas, together with a certified copy of said writ and the judgment and sentence herein, there to be confined till all of such fine and costs are fully paid and said sentence of the court, as herein pronounced, shall be fully executed. Ordered that execution may issue for the amount of fine and costs against defendant, Wm. A. Cole.

18 *Petition for Writ of Error.*

In District Court of the United States for the Northern District of Texas, at Waco.

THE UNITED STATES } 296.
vs.
WM. A. COLE. }

To the honorable judge of said court:

Your petitioner, William A. Cole, a resident of the county of Bell, in said northern district, complaining of the United States of America, of whom the Hon. Eugene Marshall, Esq., is district attorney and attorney of record, a resident of the county of Dallas, in said northern district, temporarily residing in the city of Waco and Mc-

Lennan county, in said northern district, in attendance upon the present term of said court, with respect represents—

That heretofore he was indicted by the grand jury empanelled by said court *od* having devised a scheme to defraud, to be effected by the use of the mails of the United States, and in executing the same by having placed a letter in violation of the postal laws of the United States, and upon said indictment, at the present term of said court, was tried and convicted of the offense charged in the indictment on file in this cause, and by the court sentenced to imprisonment for six months and to pay a certain fine of one hundred (100) dollars, for which judgment of conviction and sentence your petitioner desires a writ of error to review the judgment and if there be error for reversal thereof; that he here now tenders, together with his petition, his assignment of errors and form of writ and citation, together with his prayer for bail and supersedeas, and with respect prays that a writ of error may be allowed, and that he be granted his citation by the United States, to be served upon the honorable district attorney of said district, and that he be discharged upon bail, and that said writ of error shall act as a supersedeas.

JNO. L. DYER &
WILLIAMS & EVANS,
Attorneys for Petitioner, Wm. A. Cole.

19 Filed May 3rd, 1893.

J. H. FINKS, *Clerk.*

Writ of Error Bond.

UNITED STATES
vs. } 296.
WILLIAM A. COLE.

Know all men by these presents that we, William A. Cole, as principal, and the undersigned sureties signing as such, are held and firmly bound unto the United States of America in the full and just sum of twenty-five hundred dollars, to be paid to the said United States of America; to which payment, well and truly to be made, we bind ourselves and legal representatives, jointly and severally.

Sealed with our seals and dated this the 3rd day of May, A. D. 1893.

Whereas the said William A. Cole has been convicted of the offense of having devised a scheme to defraud, to be effected by using the mails of the United States, and of having mailed a certain letter in execution of said scheme; and whereas on this the said 3rd day of May, 1893, the said William A. Cole has been sentenced to a term of imprisonment of six months and to pay a fine of one hundred dollars, and a writ of error has issued and a citation been duly served in pursuance thereof to remove this cause to the Supreme Court of the United States;

And whereas bail has been allowed by the district judge of the district court for the northern district of Texas upon the conditions hereinafter stated and set out:

Now, therefore, said obligation shall be and remain in full *full* force and effect, conditioned that the said William A. Cole, principal herein, will appear before the Supreme Court of the United States, at the city of Washington, D. C., at the next term, to be holden on the second Monday in October, 1893, then and there to remain from day to day and term to term and not depart without leave of said court until discharged by said — and to abide the decision of said Supreme Court.

Witness our hands and seals this the 3rd day of May, 1893.

W. A. COLE, *Principal.*	[SEAL.]
JOHN A. COLE, *Surety.*	[SEAL.]
W. A. WILKINSON, *Surety.*	[SEAL.]
T. L. HOLLINGSWORTH, *Surety.*	[SEAL.]
J. T. COLE, *Surety.*	[SEAL.]
W. A. BARCLAY, *Surety.*	[SEAL.]
J. E. MOORE, *Surety.*	[SEAL.]
W. W. SELEY, *Surety.*	[SEAL.]

John A. Cole, W. A. Wilkinson, T. L. Hollingsworth, J. T. Cole, T. A. Barclay, and J. E. Moore, parties to the above bond, being duly sworn, depose and say that they reside in Bell county, and W. W. Seley, being duly sworn, deposes and says that he resides in McLennan county, Texas, and they further each depose and say that they are worth in property situated in the northern district of Texas, liable to execution, five thousand dollars over and above all their debts, liabilities, and exemptions.

Sworn and subscribed to before me this 3rd day of May, A. D. 1893.

J. H. FINKS,
Clerk U. S. District Court,
[SEAL.] By C. A. RICHARDSON, *Deputy.*

Personally appeared before me, the undersigned authority, on this day the above-named W. A. Cole, principal, and Jno. A. Cole, W. A. Wilkerson, T. L. Hollingsworth, J. T. Cole, W. A. Barclay, J. E. Moore, and W. W. Seley, sureties, who each acknowledged in my presence that he signed, sealed, and delivered the foregoing instrument for the purposes and considerations therein set forth.

Done at Waco, Texas, this the 3rd day of May, A. D. 1893.

[SEAL.] J. H. FINKS, *Clerk,*
By C. A. RICHARDSON, *Dep.*

Approved May 3, 1893.

J. H. FINKS, *Clerk;*
By C. A. RICHARDSON, *Deputy.*

Filed May 3rd, 1893.

J. H. FINKS, *Clerk,*
By C. A. RICHARDSON, *Deputy.*

21 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the district court of the United States for the northern district of Texas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said district court, before you or some of you, between the United States of America and William A. Cole, a manifest error hath happened, to the great damage of the said William A. Cole, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within thirty days from the date of the citation herein issued, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 3rd day of May, in the year of our Lord one thousand eight hundred and ninety-three.

The Seal of the U. S. District Court, Northern Dist. Texas, Waco.

J. H. FINKS,
Clerk of the District Court of the United States.

Allowed May 3, '93.
JOHN B. RECTOR,
U. S. Dist. Judge.

[Endorsed:] 296. United States *vs.* Wm. A. Cole. Filed May 3, 1893. J. H. Finks, clerk, by C. A. Richardson, deputy.

22 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the United States of America, of whom Eugene Marshall, Esq., is United States district attorney for the northern district of Texas and attorney of record in this cause, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the district court of the United States for the northern district of Texas, at Waco, Texas, wherein William A. Cole is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error men-

tioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 3rd day of May, in the year of our Lord one thousand eight hundred and ninety-three.

[The Seal of the U. S. District Court, Northern Dist. Texas, Waco.]

JOHN B. RECTOR,
Judge U. S. District Court for the Northern District of Texas.

22½ [Endorsed:] 296. United States *vs.* Wm. A. Cole. Citation in error. Filed May 3, 1893. J. H. Finks, clerk, by C. A. Richardson, deputy.

On this 3rd day of May, in the year of our Lord one thousand eight hundred and ninety-three, personally appeared P. B. Hunt before me, the subscriber, J. H. Finks, clerk of the U. S. circuit court for the northern district of Texas, and makes oath that he delivered a true copy of the within citation to Eugene Marshall, United States district attorney for the northern district of Texas and attorney of record in this cause, on this the 3rd day of May, 1893, at 4 p. m.

P. B. HUNT, *U. S. Marshal.*

Sworn to and subscribed the 3rd May, A. D. 1893.

J. H. FINKS, *Clerk,*
By C. A. RICHARDSON, *Deputy.*

23 *Motion to Allow Supersedeas and Bail.*

In U. S. District Court for Northern District of Texas, at Waco.

UNITED STATES
vs.
WILLIAM A. COLE. } 296.

Now comes defendant, Wm. A. Cole, and represents that he has been sentenced to imprisonment for six months and to pay a fine of one hundred dollars, from which judgment and sentence he has applied for writ of error to the Supreme Court of the United States, and with respect here now applies for supersedeas and bail upon complying with such terms as may be fixed by the court and such conditions as have been prescribed by law and rules of court.

JNO. L. DYER AND
WILLIAMS & EVANS,
Attorneys for Def't.

Filed May 3rd, 1893.

J. H. FINKS, *Clerk,*
By C. A. RICHARDSON, *Deputy.*

Order as to Supersedeas and Bail.

UNITED STATES
vs.
WILLIAM A. COLE. } 296.

MAY 3RD, 1893.

On this day, coming on to be heard the application of the defendant for bail and supersedeas pending the writ of error herein granted, and the United States appearing by the dist. attorney and the defendant appearing in his own proper person and by attorney it appearing to the court that all conditions of law and the rules of court have been complied with, it is ordered by the court that the granting of the writ of error herein shall operate as a supersedeas as to the judgment for fine and costs herein rendered against the defendant, and that he be admitted to bail in the sum of twenty-five hundred dollars, conditioned that the defendant will appear
24 before the Supreme Court of the United States, at the city of Washington, D. C., at the next term thereof, and there remain from day to day and term to term until discharged by said court and to abide the decision of said Supreme Court.

The clerk of this court or his deputy will approve the bond referred to above.

JOHN B. RECTOR,
U. S. Dist. Judge.

Order Granting 10 *Days to Fill Exceptions.*

UNITED STATES
vs.
WM. A. COLE. } 296.

MAY 3RD, 1893.

On this day came on for hearing the application of the defendant to be allowed ten days after adjournment within which to prepare drafts of the bills of exceptions taken on the trial of the above cause, and, the same having been heard, it is ordered that ten days after adjournment of this term of the court be allowed the defendant within which to prepare and submit his bills of exceptions taken on the trial, and unless the same have been prepared and submitted to the judge of this court within ten days after the adjournment of this term of the court the same will not be allowed, but if so presented within said time the same will be considered as if presented for approval before adjournment, and the approval thereof or approval of such bills of exception in lieu thereof as may be allowed by the court shall be filed and considered as if approved and filed during this term.

May 3rd, 1893.

JOHN B. RECTOR,
U. S. Dist. Judge.

Stipulation as to Filing Papers.

In District Court of the United States for the Northern District of Texas, at Waco.

THE UNITED STATES
vs.
WM. A. COLE. } 296.

It is agreed by and between the parties hereto that the clerk may endorse the file-mark upon the petition and assignment of errors as of May 3rd, 1893.

Witness our hands this May 4th, 1893.

EUGENE MARSHALL,
U. S. Dist. Att'y, Northern Dist. Tex.
JOHN L. DYER, WILLIAMS & EVANS,
Att'ys for Wm. A. Cole.

Approved:
JOHN B. RECTOR,
District Judge.

Filed May 3rd, 1893.

J. H. FINKS, *Clerk.*

Assignment of Errors.

In District Court of the United States for the Northern District of Texas, at Waco.

THE UNITED STATES
vs.
WM. A. COLE. } 296.

Now comes William A. Cole, defendant in the prosecution in said cause, being plaintiff in error on writ of error from said district court to the Supreme Court of the United States, and assigns as errors the following, to wit:

First Assignment.

The court erred in overruling the motion to quash the indictment herein filed on April 11th, 1893, for the divers and several grounds of objection therein stated, as fully appears by bill of exceptions then and there taken as follows, to wit:

1st. Because said indictment charges no offense against the laws of the United States.

2nd. Because the sundry matters alleged in the indictment concerning advertising done by the defendant, concerning contracts of various kinds, concerning compensation to be paid to agents of different kinds in the conduct of defendant's business, and concerning actual contract entered into between the defendant and B. F. Sher-

rouse, made on personal conference, all set forth in detail in
26 *in* the indictment, are not shown, even if a fraudulent purpose was intended thereby on the part of the defendant, to have taken place by or through the use of the mail service of the United States, and therefore said alleged acts are not brought within the influence of any of the penal enactments of the United States and cannot serve as the basis for a criminal prosecution.

3rd. Because the only letter of the defendant to Sherrouse, the party alleged to have been defrauded, as set forth in the indictment, and alleged to have been confided to the mails of the United States, carries with it no implication of an attempt to defraud Sherrouse, and as such letter is the gist of the offense the same (it being the only alleged matter confided by defendant to the mails) should, in order to constitute an offense, plainly and solely indicate a fraudulent purpose on its face and not be left to doubt or intendment as to its meaning by either evidence or judicial construction.

Second Assignment.

There was introduced in evidence the contract between Cole and the witness Sherrouse, the second contract between Cole and the witness Bruce, and the third contract between the Royal Publishing Company, by Holloway, and the witness Howell, copies of which are found in the bill of exceptions. The court erred in allowing these several contracts to be varied as to their written contents by the verbal testimony of the witnesses Sherrouse, Bruce, and Howell, in this, that each of the witnesses was allowed to testify that Cole stated that they should have exclusive territory in the State of Louisiana, and that no other agent should be sent into that State for the sale of the Royal Publishing Company or of Cole, but that each of these witnesses (in violation of the verbal statement of Cole) was permitted to represent the company in this terri-
27 tory, and that thereby the contract was violated; that neither of them would have accepted an agency if the contract had not given exclusive territory; that Cole promised Bruce and Sherrouse and Holloway promised Howell $100.00 per month for the service of securing ten solicitors for such month; that each of the witnesses should be allowed this amount by reason of performing the service, and that such witness did not understand that the securing of the ten solicitors would constitute a month's work, but that they were to receive $100.00 in compensation for a month's services; that the witnesses Bruce and Howell were allowed to testify that they had been told by Cole as to Bruce and by Holloway as to Howell nothing with reference to the terms of the solicitor's guarantee contract; that they did not know what the contract was; had never seen a copy of the contract before they paid their $500.00 each to Cole. Each of the witnesses above mentioned was allowed to testify that his payment of $500 or $600 was made as a deposit and not for the purchase of books, and that Cole so stated; that this deposit was only made to insure good faith on the part of the witness; that each witness was further allowed to testify that he

was only an agent under the terms of the contract and had not purchased any books; that the books shipped were still the property of Cole or the Royal Publishing Co. and were left with him to sell, and the money was left with Cole as a deposit; that the witness Howell was further allowed to testify that the contract attached to the bill of exceptions in his name was executed between him and the company, but that Holloway, acting for the company, stated, in addition to the matters set out, that Howell would not be required to secure any number of agents; that his territory should be exclusive and no other agent of the Royal Publishing Company be authorized to transact business in Louisiana; that the solicitor's guarantee contract
28 was not shown him because they had none on hand; that he did not see the contract until he reached New Orleans; that the contract had been made in St. Louis some days before, and that Holloway afterwards met him in New Orleans to open the office; that each of these witnesses were further allowed to testify that they had paid the $500 or $600, believing the verbal statements of Holloway and Cole above set out, and not for the purchase of books under the contract, and that Howell was further allowed to testify that Holloway guaranteed, on his word of honor, that the $500 should be repaid him, and that this was never done; to all of which evidence — to each portion thereof the defendant Cole objected on the ground (1st) that it tended to vary the terms of the written contract between the parties; (2nd) that there was no charge in the indictment that there was a contract giving to any one of these witnesses exclusive territory; (3rd) that the contracts themselves showed that the guarantee contract, a copy of which appears attached to the contract of the witness Sherrouse, had been supplied to each of these witnesses, and their evidence to the contrary was inadmissible; (4th) that as to the statements of the witness Howell the testimony was hearsay, and no such connection established between Cole and Holloway as would render it admissible.

Third Assignment.

The court erred in admitting to the jury the contract between Holloway, purporting to represent the Royal Publishing Company, and Howell, and any statement by way of verbal conversation between Holloway and Howell, because (1st) there was no evidence before the court at any time during the entire trial showing that Cole knew the contents of Howell's contract with Holloway, purporting to represent the Royal Publishing Company; (2nd) it appeared that a witness had signed the contract, and there was no evidence
29 accounting for the absence of the testimony of this witness to prove the contract as at common law, and until this witness was accounted for the contract could not be admitted in evidence, it being immaterial to set out the contract (the same appeared to have been signed by the Royal Publishing Company, per W. L. Holloway, and by Howell for himself, and by the witness, one R. L. Holloway); (3rd) that the testimony of Howell and his contract was hearsay.

Fourth Assignment.

The court erred in admitting numerous letters, typewritten, and purporting to be signed by the Royal Publishing Company by typewritten signature, there being no manuscript signature or seal to evidence the genuineness of the writing, the contents of which it is immaterial here to set out, the objection being that there was no proof that the same were signed by the Royal Publishing Company or by any one purporting to be authorized to sign the name of the Royal Publishing Company, the contents of which, if material, may be found in the bill of exceptions.

Fifth Assignment.

The court erred in allowing testimony of mailing a letter by Cole in furtherance of the scheme to defraud sought to be developed by the evidence, in this, that the indictment charged that Cole devised the scheme. The evidence and all the evidence showed that if there was a scheme to defraud it had been devised by the Royal Publishing Company or its agents before Cole became connected with the scheme, and whilst it is competent to have charged Cole with mailing a letter under a scheme devised by others, yet if the indictment charges a scheme devised by himself the proof must correspond to the allegation, and if it was sought to convict him of a scheme devised by another the fact should have been alleged that the scheme was devised by another, and the particular evidence to which error is herein assigned is that the letter was mailed under a scheme admitted to have been devised before Cole became connected with it, the detail of which evidence it is immaterial here to set out, the objection being that there was a variance between the proof and the allegation.

Sixth Assignment.

The court erred in allowing the witness Howell to testify that Holloway told him that he had his books manufactured by Bectole and Company, of St. Louis, because (1st) the same was hearsay and (2nd) it was immaterial, in that it tended to illustrate no issue before the jury unless upon the issue of whether the Royal Publishing Company or Cole was a publisher of books, and as to this issue it was immaterial, in that a publisher of books need not be a manufacturer of books.

Seventh Assignment.

The court erred in allowing the introduction of the letter of June 17th, 1892, addressed by Cole to Sherrouse, for the purpose of showing that such a letter was mailed, because there was a material variance between the letter introduced in evidence and the letter set out in the indictment, in that the indictment charges, among other things, as the contents of the letter, the following: " We ex-

perience no trouble whatever in securing plenty of good agents, as we guarantee them from two to three dollars per day," whereas the letter, instead of the word "then," above quoted, used the word "them;" which objection was overruled by the court.

Eighth Assignment.

The court erred in allowing the introduction of numerous letters from Cole to various parties, to wit, J. P. Noreross, R. L. Drane, John D. Blackmore, S. Joban, and others, in substance stating that he (Cole) would allow them to open an office for him in New
31 Orleans upon certain terms and conditions, substantially as set out in the contracts of Bruce, Sherrouse, and Howell, because (1st) the same were addressed to third parties, who are not shown to have taken any part in the scheme to defraud (if any); (2nd) there was no exclusive territory granted to any witness, and these letters, if they had been perfected into a contract between the parties, would not have illustrated any issue before the jury except as to exclusive territory; (3rd) they were decoy letters, not written in good faith, but intended only to entrap the defendant into making propositions for their employment by him, to be used as evidence for B. F. Sherrouse in his effort to evade the contract of purchase between him and Cole.

Ninth Assignment.

The court erred in allowing the witness Howell to testify that the Royal Publishing Company did not pay him $100.00 a month, and that Cole did not pay him $100 a month, because it was not shown that Cole was under any obligation to pay Howell any sum, his contract having been made with the Royal Publishing Company by Holloway without the knowledge or participation of Cole further than that Cole answered a letter of Howell's, stating that he believed he could make money by entering the employ of the Royal Publishing Company before Howell did actually enter its employ and without Cole's ever having seen the contract or become in any way obligated to Howell further than in giving the above advice.

Tenth Assignment.

The court erred in refusing to allow the witness W. B. Floyd to testify that he knew several persons who had worked for Cole under the solicitor's guarantee contract; that they had completed their work under the contract and were satisfied with the contract, and that they either made more than three dollars per day out
32 of their commissions or the difference between three dollars per day and the amount received as commission was paid to such solicitors by Cole; that some of these persons had received more than three dollars per day out of commission and some had not, and these last were paid the full amount of three dollars per day for each day and were satisfied with their contract; that these

facts were known to him by association with the said persons, and that by their representations as above set out he was led to go to Temple to see Cole and make a contract with him.

Eleventh Assignment.

The court erred in refusing to allow the defendant to introduce evidence of the contents of the books described in the indictment, known in the evidence as "Great Disasters" and "Wild Life on the Plains," for the purpose of showing the character of the publications and to show that they were instructive, interesting, and elevating in tone, to illustrate the issue of whether they were salable, the evidence offered tending to show the above facts, and that the books were salable by reason of their being instructive and elevating in tone and containing the narrative of the life of Custer and of the history of great disasters in the world's history.

Twelfth Assignment.

The court erred in charging the jury that if there was a scheme to defraud it will be looked for in this case in the fact that the general agents were to get a salary of $100.00 per month besides commission, and that it practically was to come largely out of the deposits of $15.00 to be made by each agent and solicitor employed by the general agent, ten a month, because (1st) as a matter of fact the written contracts show that the general agents had no promise or obligation from Cole or the Royal Publishing Company to receive $100 per month besides commission, nor that it was to
33 come out of the deposits of $15.00 to be made by the solicitors employed by the general agent, but, on the contrary, the contract bound Cole to pay $10 for each agent employed, and this was a personal obligation.

(2nd.) If the above charge is not obnoxious to the first objection, then it is certain that the same was misleading and did not submit to the jury the real issue, which was as to whether or not the scheme to defraud arose out of the real terms of the guarantee contract referred to in the later charge of the court, contained in the same paragraph, wherein the jury are instructed that if the defendant concealed the nature of the guarantee contract from the general agent, and particularly the requirements therein that each solicitor was to deposit $15 with him as a prerequisite of his (the solicitor's) employment, until after such general agent had deposited with the defendant Cole $500 or $600, and such concealed requirement destroyed the capacity to go on with his contract and resulted in the forfeiture of his $500 or $600, and that such result was designed by Cole, in which event they should find a scheme to defraud, the two portions of the paragraph being misleading and not responsive each to the other, inconsistent and tending to mislead the jury.

Thirteenth Assignment.

The court further erred in the same paragraph of this charge in instructing the jury if there was no such concealment by Cole from

the general agent of the solicitor's contract, and particularly of the requirement of $15 to be paid by each solicitor and road agent, if the contracting agent inspected or had a fair chance to inspect their contracts before depositing the money, then their is nothing on the face of the contracts necessarily implying a scheme to de-
34 fraud, and if a scheme to defraud existed on the part of defendant it is to be found in the mode and plan of carrying on the business as indicated above and not in the contract set up, because (1st) by the use of the word "necessarily" the minds of the jury were left to supply what the terms of the charge did not give in explicit language as to the construction by the court of the terms of the contract or the scheme to defraud or the evidence necessary to show such scheme, and (2nd) the last clause in the charge, which proceeds further to say if a scheme to defraud existed on the part of defendant it is to be found in the mode and plan of carrying on the business as indicated above and not in the contract set up, because the court nowhere states the mode and plan of carrying on the business such as would show to the jury the views of the court as to what would constitute such mode and plan requisite to constitute in law a scheme to defraud.

Fourteenth Assignment.

The court erred in charging the jury that if the Royal Publishing Company had concocted a scheme to defraud such as was charged in the indictment and the defendant, knowing the scheme, connected himself with it and under the name of the company in executing the scheme sent out letters and pamphlets through the post office, then in the eye of the law he devised the said scheme, (1st) because the indictment charged that Cole devised the scheme, and proof that the scheme was devised by some one else was a variance and would not support a conviction under the charge; (2nd) it was immaterial to prove a scheme devised by some one else unless the indictment charged that under a scheme devised by another, either known or unknown, Cole had mailed the letter in question, since he could not be convicted, as the indictment charged that he devised the particular scheme under which he was at bar for trial, and he was not charged as an accomplice or accessory or
35 principal in carrying out the scheme of another.

Fifteenth Assignment.

The court further erred in charging that if there was a scheme to defraud and the defendant sent out the letter set out in the indictment in the execution of the scheme it would be immaterial that the letter itself on its face was innocent, because (1st) there was no proof that the letter described in the indictment was mailed, there being a variance between the letter charged in the indictment to have been sent and the letter introduced in evidence as having been the letter which was actually sent, and (2nd) because if the letter itself was innocent there was no misuse of the mails or violation of law.

Sixteenth Assignment.

The court erred in his charge (paragraph 5) wherein he attempted to control the evidence introduced for the purpose of illustrating the scheme to defraud, in this, that Howell had testified to facts and circumstances with which Cole was not shown to have been connected except by way of a letter to Howell before he entered into his contract with the Royal Publishing Company, and it did not appear from the evidence that Cole had ever seen Howell's contract or in any manner co-operated with the Royal Publishing Company in defrauding Howell, if he was defrauded, and especially in that Howell's contract differed from the contracts made by Cole for the reason that Cole had supplied to Bruce and Sherriuse and other agents established by him full explanations and copies of the several contracts, all of which made the scheme as developed by Cole differ from the scheme as developed by Howell and Holloway, by reason of which the court should have guarded the evidence introduced as to the contract between Howell and Holloway and instructed the jury not to convict Cole upon that evidence
36 nor to consider it unless they should find Cole knew that such a scheme and contract was being perpetrated upon Howell by Holloway or in some manner was connected with or co-operating in the scheme, having knowledge of the contract with Howell or of the representations made by Holloway to him.

Seventeenth Assignment.

The defendant proved a good character, as shown by the charge of the court, in charging upon which the court instructed the jury not to consider unless the testimony leaves the minds of the jury balanced or in doubt as to the guilt of the defendant, because in that event the jury would be required to acquit under the next charge of the court to give him the benefit of such doubt, the effect of the two charges being to withdraw from the jury all benefit to be derived by the proof of good character, which was so complete that the court ruled that no further testimony upon that issue should be admitted.

Eighteenth Assignment.

The court further erred in submitting to the jury his charge in failing to define to the jury what phase of the evidence would entitle them to acquit the defendant, it having been shown by the testimony of the prosecution and of the defendant that he made a full explanation of the whole plan of his business to the parties in good faith and that he was in the general book business, establishing agents and selling through agents and through his home office, in which event the scheme as developed was an honest one to sell his books and not to perpetrate fraud, and if so he was *he* entitled to a verdict of not guilty, which was not presented to the jury under any charge of the court; but, on the contrary, in this connection

the jury was instructed merely that a scheme to defraud might be found by them if "the mode and plan of carrying on the
37 business as indicated above" should be developed by the evidence without saying what mode or plan of carrying on the business was meant by the court.

JNO. L. DYER,
WILLIAMS & EVANS,
Attorneys for Wm. A. Cole.

Filed May 3rd, 1893.

J. H. FINKS, *Clerk.*

38 *Bills of Exception.*

In District Court of the United States for the Northern District of Texas, at Waco.

THE UNITED STATES
vs.
WM. A. COLE. } No. 296.

Be it remembered that on the trial of the above numbered and entitled cause the Government offered evidence tending to sustain the indictment, and the following bills of exception were taken by the defendant:

Bill of Exception No. 1.

Be it remembered that on said trial the defendant, Wm. A. Cole, presented his motion to quash the indictment in the said cause as follows, to wit:

In District Court of the United States within and for the Northern District of Texas.

THE UNITED STATES
vs.
W. A. COLE. } No. 296.

Now comes the defendant, by counsel, and, demurring and excepting to the sufficiency of the indictment herein, says same is insufficient in law to require this defendant to plead thereto for the following reasons:

1st. Because said indictment charges no offense against the laws of the United States.

2nd. Because the sundry matters alleged in the indictment concerning advertising done by the defendant, concerning contracts of various kinds, concerning compensation to be paid to agents of different kinds in the conduct of the defendant's business, and concerning actual contract entered into between the defendant and B. F. Sherrouse, made on personal conference, all set forth in detail

in the indictment, are not shown, even if a fraudulent pur-
39 pose was intended thereby on the part of the defendant, to have taken place by or through the use of the mail service of the United States, and therefore said alleged acts are not brought within the influence of any of the penal enactments of the United States and cannot serve as the basis for a criminal prosecution.

3rd. Because the only letter of the defendant to Sherrouse, the party alleged to have been defrauded, as set forth in the indictment, and alleged to have been confided to the mails of the United States, carries with it no implication of an attempt to defraud Sherrouse, and as such letter is the gist of the offense the same (it being the only alleged matter confided by defendant to the mails) should, in order to constitute an offense, plainly and solely indicate a fraudulent purpose on its face and not be left to doubt or intendment as to its meaning by either evidence or judicial construction.

Wherefore defendant prays that his said exceptions be sustained and the indictment herein be quashed.

(Signed) JNO. L. DYER,
Attorney for Defendant, W. A. Cole.

Which having been heard by the court was in all things overruled; to which ruling of the court the defendant then and there, in open court, did except and tender this his bill of exceptions.

Bill of Exception No. 2.

Be it remembered that on the trial of the above numbered and entitled cause the Government introduced the following contracts, to wit:

Contract.

This contract was made at Temple, State of Texas, county
40 of Bell, this the 7th day of July, A. D. 1892, by and between the Royal Pub. Co. of St. Louis, State of Missouri, party of the first part, and B. F. Sherrouse of New Orleans, State of Louisiana, county of Orleans, party of the second part.

"Witnesseth: In consideration of the promises and agreements of the said party of the first part as hereinafter contained, the said *said* party of the second part promises and agrees as follows:

"First. To enter the employ of the said first party in the capacity of general agent, for the term of one year from the date of this contract, and to select and appoint suitable solicitors and road agents for the sale of th- books and publications of the first party, and hereby promises and agrees to deal honorably with solicitors, road agents, and the public, and to devote his time and attention diligently and faithfully to securing and instructing solicitors and road agents, and to establish not less than ten solicitors each month upon the terms and requirements of the 'solicitor's guarantee contracts' supplied said second party by said first party, a copy of which is hereto attached and made part of this contract, and to work the territory as may be hereafter assigned and such other territory as

may be hereafter mutually agreed upon by the parties hereto, and to render said first party weekly, a written report of all solicitors and road agents engaged and money collected of each solicitor and road agent.

"Second. Said second party further agrees to place to the credit of said first party all monies that he may collect from solicitors and road agents each month, after deducting salaries and all office expenses, including freight and express charges, advertising, etc., and the cost of goods hereinafter specified, except that he shall retain a commission of ten per cent. on the retail price of all goods
41 sold from said general agent's office. Said sum of money to be deposited in any bank of New Orleans, La., designated by said first party.

"Third. Said second party further agrees to carry from time to time a $1,000 stock of goods at retail prices to supply the trade solicitors and road agents operating under his supervision, said stock to be invoiced to said second party at sixty per cent. of the retail price.

"Fourth. It is agreed and understood that the said agency shall have the privilege of advertising, sending agents, and doing business in the territory covering southeast Texas, entire States of La., Miss., Ala., and Tenn., and any other territory that may be hereinafter mutually agreed upon.

"Fifth. In consideration of the agreements and promises of the said party of the second part, as written above, the said party of the first part promises and agrees to pay to the said second party the sum of one hundred dollars per month, it being mutually agreed and understood that the appointment of ten solicitors each month, upon the terms and requirements of the 'solicitor's guarantee contract' supplied said second party by said first party and mentioned in part first of this contract, shall constitute one month's work.

"Sixth. It is mutually agreed and understood by both parties to this contract that should said second party fail to secure the required number of solicitors each month he does not forfeit his entire salary, but shall receive salary in proportion to the number of solicitors appointed, and any overplus appointed during any month or months shall go to make up any deficit in any other month or months during this contract.

42 "Seventh. Said first party further agrees to open and furnish an office for said second party at New Orleans, La., supply all office stationery, report forms, blank contracts, drill books of instructions necessary to solicitors and road agents, to properly conduct the business of the office and further agree to send a competent man to assist and instruct said second party in all the branches of his department until said second party thoroughly understands all the details of the work.

"Eighth. Said first party further agrees to purchase from said second party any and all books that he may have on hand, purchased from said first party at the expiration of this contract, and to pay the said second party the same prices for said stock as they

were invoiced to him, cash on delivery, books to be in good condition.

"Ninth. It is further agreed and understood that said second party shall have the right to collect all monies for goods supplied the trade of his office. Said first party further agrees to do all in his power in the way of liberal dealings and advisory counsel, to the end that said second party may attain the greatest possible success.

"In witness whereof the parties set their hands and seals in duplicate this 7th day of July, A. D. 1892.

"(Signed) ROYAL PUBLISHING CO., [SEAL.]
"Per W. A. COLE, *Agent.* [SEAL.]
"B. F. SHERROUSE. [SEAL.]"

43 "*Solicitor's Guarantee Contract.*"

"This contract made at ——, State of ——, on the — day of ——, A. D. 189–, by and between ——, of ——, county of ——, State of ——, parties of the first part, and ——, of ——, county of ——, State of ——, party of the second part.

"Witnesseth: In consideration of the promises and agreements of the said party of the first part, as hereinafter contained, the said party of the second part promises and agrees as follows:

"First. To enter the employ of the said party of the first part in capacity of agent for the sale of the book entitled —— and to devote his time and attention to the sale of said book for a period of ——, beginning —— —, 189–.

"Second. Twenty-six days of seven hours per day are to constitute a month's work and any time deducted from the work shall be made up and this contract is not to expire until full time has been worked, except as hereinafter provided.

"Third. Said party of the second part shall, before entering upon such work, devote such time as said first party may direct under his tuition in preparation for said work, and shall give a good and sufficient letter of credit to be approved by said first party. He shall devote his exclusive time and attention to said employment. He shall in the course thereof make a thorough canvass of such territory as may be assigned him by said first party from time to time and no other. He shall render to said first party, daily, a written report on blank forms, to be supplied by said first party, of all orders taken by said second party, and to order books in due time to fill all orders so reported. These reports shall
44 be made out and mailed daily, unless second party is not within convenient distance of a post office, and in such case the report shall be made out and mailed at the first possible *oppurnity.* And said second party at the close of each week, shall also render a report, which report shall be a summary of his acts and doings hereunder during the week, and such other facts concerning said employment as said first party may demand or require from time to time. He shall deliver all books sold by him, as per reports and collect the retail price thereof as fixed by said first party.

In case any books shall remain on hand after delivery, said second party shall return such books and pay the expressage or other charges and expense of such nature, and in that event there shall be placed to his credit a sum equal to the amount paid by said second party for said goods so returned in first-class condition, as per price paid for said goods by said second party.

"Fourth. It is expressly agreed that said second party shall defray his expenses defrayed by him in and about said employment, and that in making above remittances he shall make no reduction from the retail price of said books, as fixed by said first party except as provided herein.

"Fifth. It is understood and agreed that any failure on the part of the said second party to fulfil any of the conditions above provided to be performed on his part, shall operate as a termination of this agreement, at the option of the said first party.

"Sixth. It is understood that said second party shall furnish no books to the trade and shall deal honorably with the public.

"Seventh. It is agreed by said second party that he will consider the conditions of this contract as strictly confidential.

45 "Eighth. It is agreed and understood that said second party shall pay said first party fifteen dollars (15.00) before signing contract. Said second party shall receive for the said fifteen dollars one complete outfit, consisting of — and all necessary blanks.

"Ninth. It is understood and agreed that said second party may quit work at any time he desires by returning to said first party the prospectus. But it is expressly understood that he shall retain the complete copies purchased (at retail prices) with said outfit as full compensation for the amount paid for said outfit, and forfeits all claims to compensation for his time, except 40 per cent. commission on books he delivers aside from copies purchased with said complete outfit.

"In consideration whereof the said first party agrees to pay to the said second party for his services a commission of forty per cent. on the gross amount of said sales. But it is expressly agreed that such commission must be fixed upon the retail price and only allowed and paid after said first party shall have received sixty per cent. of said retail price. And if when second party has canvassed the full number of days specified in this agreement, it is found that his commission, computed upon the basis of reports given does not average — dollars per day for each full day actually spent in soliciting orders for the above-mentioned book during the period of this agreement, then said first party agrees to pay to said second party a sum sufficient to make up said average of — dollars per day.

"It is further agreed by said first party that when said
46 second party has canvassed — days (this being the time specified in the contract that he has to canvass), *that* said first party will pay to said second party, on his returning the complete outfit, fifteen dollars, the amount paid for it.

"X. It is expressly understood that no verbal agreement can in any way change or modify any condition named in this contract.

"In witness whereof the parties to these presents have hereunto set their hands and seals in duplicate, the day and year first above written.

"____ ____, [SEAL.]
"Per ____ ____. [SEAL.]
"____ ____. [SEAL.]

"Witness-:
"____ ____.
"____ ____."

"*Contract.*

"This contract made at Temple, State of Texas, county of Bell this 18th day of April A. D. 1892, by and between Royal Pub. Co., of St. Louis, State of Missouri, party of the first part, and Wm. Bruce, of San Antonio, State of Texas, county of Bexar, party of the second part:

"Witnesseth: In consideration of the promises and agreements of the party of the first part as hereinafter contained, the said party of the second part promises and agrees as follows:

"First. To enter the employ of the said first party in the capacity of general agent for the term of one year from the date of this contract, to select and appoint suitable agents for the sale of the books and publications of the said first party, and hereby promises and agrees to deal honorably with agents and the public, and
47 devote his entire time and attention diligently and faithfully to the securing and instructing sub-agents and to appoint not less than ten sub-agents per month upon the terms and requirements of the solicitor's guarantee contracts supplied said second party by said first party, and to work the territory as hereafter assigned, and such other territory as may be hereafter mutually agreed upon by the parties hereto, and to render said first party weekly a written report of all agents established and money collected of each agent.

"Second. Said second party further agrees to place to the credit of said first party all money that he may collect from sub-agents and general agents each month, after deducting salary and all office expenses, including freight and express charges on all goods received from said first party, and the cost of goods as hereafter specified, except that he shall retain a commission of ten per cent. on the retail price of all goods sold by his agents, said sum of money to be deposited in any bank of New Orleans designated by said first party.

"Third. Said second party further agrees to carry a $1,000 stock of goods at retail prices to supply solicitors and general agents operating under his supervision, said stock to be billed to said second party at sixty per cent. of retail price, viz:

"Said second party further agrees to keep this amount of stock on hand from time to time to supply the trade of his department.

"Fourth. In consideration of the promises and agreements of said party of the second part as written above, the said party of the first part promises and agrees to pay the said party of the second part one hundred dollars per month, it being mutually agreed and un-

derstood that the appointment of ten sub-agents each month, upon the terms and requirements of the solicitor's guarantee
48 contracts supplied said second party by said first party and mentioned in part first of this contract shall constitute one month's work, for which the above sum is to be paid.

"Fifth. Said first party further agrees to open an office for said second party at New Orleans, La., supply all office stat*t*io-ery, report forms, blank contracts, drill books of instructions necessary to agents to properly conduct the business of said office, and further agrees to assist and instruct said second party in all the branches of his department until said second party thoroughly understands all the details of the work in the estimation of said first party.

"Sixth. Said first party further agrees to purchase from said second party any and all books that he may have on hand purchased from said first party at the fulfilment and expiration of the contract, and to pay the said second party the same price for said stock as they were billed to him, cash on delivery, books to be in good condition.

"Seventh. It is further agreed and understood that said second party shall have the right to collect all money for goods supplied the trade of his office. Said first party further agrees to do all in his power in the way of liberal dealing and advisory counsel to the end that said second party may attain the greatest possible success.

"In witness whereof the parties set their hands and seals in duplicate this the 18th day of April, A. D. 1892.

"ROYAL PUB. CO.,
"Per W. A. COLE, *Ag't.* [SEAL.]
"WILLIAM BRUCE. [SEAL.]"

In addition to the contracts between Cole and Bruce and
49 Cole and Sherrouse, above set out, the prosecution offered a contract between what purported to be the Royal Publishing Company, by one Holloway, as president, and the wi-ness F. L. Howell, substantially in the same terms as that with William Bruce, except it provided for five hundred (500) dollars to be paid by Howell to the company instead of six hundred (600) dollars, as called for in Bruce's contract.

That this contract was dated in December, 1891.

(Notation by Judge Rector: Insert here bill- of exception Nos. 1 & 2, by district attorney.)

Bill of Exception No. 1, *by District Attorney.*

This contract between the Royal Publishing Company and F. S. Howell was in words and figures following, to wit:

"This contract made and entered into at St. Louis, State of Mo., county of ——, this 9th day of Dec., A. D. 1891, by and between the Royal Publishing Company of St. Louis, State of Missouri, party of the first part and F. S. Howell, of New Orleans, State of La., county of New Orleans, party of the second part.

"Witnesseth: In consideration of the promises and agreements of the said first party as hereinafter contained, the said party of the second part promises and agrees as follows:

"First. To enter the employ of said first party in the capacity of manager for the term of one year from the date of this contract to select and appoint suitable agents for the sale of the books and publications of the said first party, and hereby promises and agrees to deal honorably with agents and the public and to devote his entire time and attention diligently and faithfully to securing and instructing sub-agents, and to establish not less than ten sub-agents each month upon the terms and requirements of the solicitor's guarantee contracts, supplied said second party by said first party, and to work the territory as hereafter assigned and such other territory as may be hereafter mutually agreed upon by the parties hereto and to render said first party weekly a written report of all agents established and money collected of each agent.

50

"Second. Said second party further agrees to place to the credit of the said first party all money that he may collect from sub and general agents each month after deducting salary and all office expenses including freight and express charges on all goods received from said first party and cost of goods as hereinafter specified except that he shall retain a commission of 10% on the retail price of all goods sold from his agents; said sum of money to be deposited in any bank of New Orleans, La., designated by said first party.

"Third. Said second party further agrees to carry a 850.00 eight hundred $\frac{50}{100}$ dollars stock of goods at retail prices to supply solicitors operating under his supervision said stock to be billed to said second party at sixty per cent. (60) of the retail *pr* price. Said second party further agrees to keep this amount of stock on hand from time to time to supply the trade of his department.

"Fourth. In consideration of the promises of the said party of the second part as written above the said party of the first part promises and agrees to pay the said second party one hundred dollars per month, it being mutually agreed and understood that the appointment of ten sub-agents each month upon the terms and requirements of the solicitor's guarantee contracts supplied said second party by said first party and mentioned in part first of this contract shall constitute one month's work for which the above sum is to be paid.

51

"Fifth. Said first party further agrees to open an office for said second party at New Orleans, La., supply office stationery, report forms, blank contracts, drill books of instructions necessary to agents to properly conduct the business of said office and further agrees to assist and instruct said second party in all the branches of his department until said second party thoroughly understands all the details of the work in the estimation of said first party.

"Sixth. Said first party further agrees to purchase from said second party any or all stock of goods that he may have on hand purchased from said first party at the expiration and fulfilment of

the contract and to pay the said second party the same prices for said stock as they were billed to him, cash on delivery, books to be in good condition.

"Seventh. It is further agreed and understood that said second party shall have the right to collect all money for goods supplied the trade of his department. Said first party further agrees to do all in his power in the way of liberal dealings and advisory counsel to the end that said second party may attain the greatest possible success.

"In witness whereof the parties set their hands and seals in duplicate this 9th day of December A. D. 1891.

"[Seal Royal Publishing Co., St. Louis, Mo.]

"ROYAL PUB. CO. [SEAL.]
"RUSSEL WOOLDRIDGE. [SEAL.]
"F. L. HOWELL. [SEAL.]

Witness:
"L. R. HOLLOWAY."

52 *Exception No. 2.*

"It was in evidence in connection with the foregoing instruments that the Royal Publishing Company, whose name appears signed to the foregoing instruments, purporting to be contracts of that company with William Bruce, B. F. Sherrouse, and W. F. Howell, was a corporation organized under the laws of the State of Missouri, with W. R. Holloway as president and his brother, L. F. Holloway, as its vice-president and one Russel Woolridge as its secretary; that the said Royal Publishing Co. kept and maintained its main office in the city of St. Louis, in the State of Missouri, and purported to be engaged in the business of publishing and dealing in books; that it advertised extensively in newspapers in the States of Missouri, Texas, Louisiana, Arkansas, Alabama, and Georgia for agents to carry on and manage its business, to whom it proposed to give salaries at not less than $100 per month; that in November, 1891, W. S. Howell, residing in the city of New Orleans, Louisiana, answered one of these advertisements, which led to an extensive correspondence between said Howell and Royal Publishing Company, whose business was transacted at that time by one W. R. Holloway; that this correspondence culminated at the solicitation of said W. R. Holloway, acting on behalf of the Royal Publishing Company, in a personal interview between the said Holloway and the said Howell in the city of St. Louis, Mo., and at the office of the Royal Publishing Company, in which, after considerable conversations respecting the business, the said Howell, on the 5th of December, 1891, signed the foregoing instrument purporting to be a contract between him and the Royal Publishing Company, and afterwards made a deposit of $500 for the faithful performance on his part of said contract, as he then understood it, with the Royal Publishing Company; that there-

after the said Holloway repaired with the said Howell
53 to the city of New Orleans for the purpose of establishing him, the said Howell, as an agent and manager of the Royal Publishing Co. in the city of New Orleans and for the territory of Louisiana; that while he was there and before he, Holloway, had completed his work as it had been understood between him and Howell, Holloway claimed that his child was lying at the point of death in the city of St. Louis, and that he, Holloway, was obliged to leave, which, under the representations so made, and yielding to his (Holloway's) urgent solicitations for permission, Howell assented *to;* that prior to the transactions of Howell with Holloway and the Royal Publishing Company the defendant, W. A. Cole, had been advertising for himself for agents the same as the Royal Publishing Company, offering salaries of not less than $100 per month for live and energetic men to act as agents and managers; that these advertisements were published in the States of Louisiana and Texas; that the Royal Publishing Company referred Howell to Cole for information in regard to the character and value of the business, and that Cole expressed himself in letter, in response to these enquiries, to Howell as being well satisfied with said busines-; that in December, 1891, one William Bruce, of San Antonio, Texas, answered the advertisements of Cole, and that numerous letters passed between him, the said Cole, and Bruce, which culminated, at the solicitation of Cole, in a personal interview at Temple, Texas, between Bruce and Cole, where Bruce discovered that Cole was acting under the name of the Royal Publishing Company, and claimed to be an agent of the Royal Publishing Company; that after considerable negotiations and conversations respecting the business between Bruce and Cole at Temple, Texas, Bruce decided to enter into a contract as agent of the Royal Publishing Company and Cole for the territory of Louisiana, with an office and headquarters in the city of New Orleans; that one Joe R. Taylor, who was agent and manager and employee of Cole, went to New Orleans to establish Bruce
54 in the business; Bruce having deposited $500 and signed the contract hereinbefore set out on the 18th of April, 1892, the deposit of $500 having been made by Bruce for his (Bruce's) faithful performance of his part of the c-ntract, Bruce and Taylor went together to New Orleans, where after some delay an office was opened, but before Taylor had completed all that Bruce expected and required of him, Taylor claimed to Bruce that his child was ill and lying at the point of death and solicited him (Bruce) to permit him to return to Temple, which Bruce assented to. There was evidence going to show that his child was sick.

"In none of the conversations, letters, and negotiations with Bruce by Cole and Taylor was anything said by either Cole or Taylor respecting Howell's contract with the Royal Publishing Company or any of the transactions of the Royal Publishing Company with Howell.

"That in June, 1892, one B. F. Sherrouse, a resident of New Orleans, State of Louisiana, also perceiving the advertisements of Cole in the newspapers of New Orleans, answered the same; whereupon

considerable correspondence between Sherrouse and Cole ensued, and, at the solicitation of Cole, Sherrouse went to Temple, where, after considerable conversations respecting the business, Sherrouse decided to enter into a contract, as the agent of the Royal Publishing Company, for the city of New Orleans and the State of Louisiana, and deposited $600 with Cole for the faithful performance of his, Sherrouse's, part of the contract hereinbefore set forth, on the 7th of July, 1892. As soon as the contract had been signed the same Joe R. Taylor went with Sherrouse to the city of New Orleans as the confidential agent and employé of Cole and the Royal Publishing Company to open an office and establish him (Sherrouse) in the business in the city of New Orleans, and after remaining
55 there a *a* short time, and before his work had been completed, Taylor claimed that he or a member of his family *were* very ill, and exhibited to Sherrouse symptoms of the utmost distress, and begged to be excused from remaining longer in New Orleans, which Sherrouse assented to, and Taylor returned to Temple. Neither Cole or Taylor informed Sherrouse of the previous contracts and transactions of the Royal Publishing Company with Bruce and Howell and the previous transactions of Cole and Taylor with Bruce.

A number of books, known as "The Horrors and Disasters in the World's History," "Wild Life on the Plains," and "Horrors of Indian Warfare," were shipped to both Howell, Bruce, and Sherrouse, and both Howell, Bruce, and Sherrouse proceeded to advertise in newspapers for solicitors, guaranteeing them $3 per day to canvass the sale of said books, but they could not procure any persons to accept employment under the terms of the solicitor's guarantee contracts; that while many persons answered the advertisements of Bruce and Howell none would undertake to deposit $15.00 for a complete outfit of either of said works, which outfit consisted of one copy of either "The Horrors and Disasters of the Word's History," or "Wild Life on the Plains," or "The Horrors of Indian Warfare;" that they had each severally been promised by the Royal Publishing Company the territory of Louisiana and New Orleans and did not know of the existence of any contracts with any other persons for that territory or of any of the transactions of the Royal Publishing Company with any other persons at the time they made their respective deposits; that the contracts of both Howell, Bruce, and Sherrouse extended over the year 1892; that none of the money deposited by Howell, Bruce, and Sherrouse was ever returned by the defendant Cole, or the Royal Publishing Company either to Bruce, Sher-
56 rouse, or Howell, notwithstanding their repeated efforts to obtain the same, and that the books remained and still remain in the possession of said Bruce, Sherrouse, and Howell, undisposed of; that the defendant, Cole, and the Royal Publishing Company have never offered to return the money, and claim the same as forfeited because *as* the non-compliance of Bruce, Sherrouse, and Howell with the terms of the instruments hereinbefore set forth in not procuring the number of sub-agents stipulated for according to the terms of the solicitor's guarantee contract.

Be it further remembered that each witness being party respectively to one of the contracts above referred to, after the introduction of the contract in writing, was permitted by the court to testify to alleged conversations on the part of such witness with reference to what he understood to be the contract between himself and the Royal Publishing Company; that Cole stated to Bruce and Sherrouse respectively and that Holloway stated to Howell that the Royal Publishing Company would give to such contracting partie- exclusive territory in the State of Louisiana, and that no other agent should be sent into that State for the sale of books of the Royal Publishing Company or by the Royal Publishing Company or by Cole, but that in violation of this statement successive agents were sent into the territory, to wit, Howell, Bruce, and Sherrouse; that neither of the witnesses would have accepted an agency if the contract had not given exclusive territory; that each witness was promised on the part of the Royal Publishing Company, by its agent acting for it, one hundred dollars p-r month for the service of securing ten solicitors for such month; that each of the witnesses would be allowed this amount by reason of performing the service, and that each witness did not understand that the securing of ten solicitors would constitute a month's work, but that
57 each was to receive $100, according to the verbal statement of the agent representing the Royal Publishing Company, in compensation for a month's services, meaning a calendar month; that neither the witness Bruce or Howell had seen a copy of the "solicitor's guarantee contract" before signing the contract with the Royal Publishing Company; that they did not know its contents and were wholly ignorant with reference thereto; that they paid their respective sums of $500 and $600 before they had seen a copy of the solicitor's guarantee contract; that these sums were paid respectively as a deposit and not for the purchase of books, and that Cole so stated the payment to be as a deposit in making his contract with Bruce and Sherrouse, and Holloway so stated to Howell, each further stating that the d posit was only made to insure good faith on the part of the witness, and that the witness was only an agent under the terms of the contract for the Royal Publishing Company, and that the amount paid in was a deposit and not for the purchase of the books; that the books remained the property of Cole or the Royal Publishing Company, and were left with him to sell as such agent on a commission of ten per cent., and the money was left with Cole as a deposit; that Howell was permitted to testify that Holloway stated verbally that the witness would not be required to secure any number of agents; that his territory should be exclusive, and no other agent of the Royal Publishing Company would be authorized to transact any business in Louisiana; that this last statement was also made by Cole to Bruce and Sherrouse; that Howell was further told by Holloway, and Bruce was told by Cole, that he could not show him the solicitor's guarantee contract because there were none on hand, and that
58 neither of these witnesses saw the contract called the solicitor's guarantee contract until he reached New Orleans; that Howell

made his contract in St. Louis & Bruce made his in Temple, Tex.; that Holloway afterwards met Howell in New Orleans, and one Joe R. Taylor met Bruce in New Orleans, each for the purpose of opening an office; that each of the three witnesses above stated were allowed to testify that they had paid the $500 or $600 upon the faith of the verbal statements of Cole and Holloway and not for the purchase of books under the contract; that Howell was further allowed to testify that Holloway guaranteed on his word of honor that the $500 should be repaid him, which was never done.

(Notation by Judge Rector: Insert here bill of exception No. 3, by district attorney.)

Bill of Exception No. 3, by District Attorney.

It is further in evidence that the conversations in which the defendant, Cole, promised them exclusive territory were had during an interview with Cole by Bruce and Sherrouse and with Holloway and Howell, which interview had been brought about in the cause of Bruce and Sherrouse by Cole advertising and causing to be advertised in a number of newspapers published in distant cities, in substance as follows: "Wanted, an active, energetic man to manage a branch office; salary not less than $100 per month and commission on sales. Applicant must have first-class references and from $800 to $1,200 cash capital. Address P. O. box 101, Temple, Texas." That Bruce, having seen these advertisements in certain newspapers, corresponded with Cole in regard to the nature of the business which was the subject of the advertisements; that numerous letters passed between Cole and Bruce, in which the former solicited the latter to come to Temple and satisfy himself by a personal investigation, and that Bruce did in point of fact go from San Antonio, Texas, to Temple, Texas, and Sherrouse from New Orleans, Louisiana, to investigate the nature of the business
59 and the reference furnished by Cole and to ascertain, as far as he, Bruce, and he, Sherrouse, could, the character of the business. The evidence tended to show that these conversations were had before any contract was signed or deposits made by Bruce or Sherrouse and before he (Bruce) and he (Sherrouse) could understand the nature of the business or the scheme which he (Cole) was engaged or the terms of the instruments which he (Bruce) and he (Sherrouse) would be required to sign, which information was held by Cole from Bruce until the deposit of money had been made by both Bruce and Sherrouse.

"The conversations and statements in which Cole promised him (Bruce) and Sherrouse exclusive territory for the city of New Orleans were had before any deposit was made or instrument signed, as also all the conversations in reference to the purposes for which the money was deposited with Cole, and that the statements to Howell by Holloway were made under similar circumstances of advertisements and correspondence and personal interviews of Howell with Holloway before contracts were signed and deposit was made.

"The statements and conversations which are made the subject of this bill of exception were offered by the Government and admitted by the court as circumstances tending to show the inducements which led both Bruce and Sherrouse to sign the instruments hereinbefore set forth, and as evidence of the means employed by Cole acting for himself, under the name Royal Publishing Company, to induce Bruce and Sherrouse, and in the case of Howell by Holloway as president of the Royal Publishing Company, into signing the instruments and making their respective deposits of money, so that Cole could thereafter convert the money so deposited to his own use upon the pretence that Bruce and Sherrouse had
60 not complied with the terms of the written instruments which by these representations he had procured them to sign.

"It was further offered and admitted in evidence as bearing upon the manner in which the alleged scheme to defraud set out in the indictment was effected and as tending to show that the persons so making these deposits understood and believed that they were employed by Cole and the Royal Publishing Company at a salary of $100 per month to secure other agents upon the terms set forth in the instruments known as the 'solicitor's guarantee contracts' for the purpose of selling certain publications, the price of which would be fixed by the Royal Publishing Company and Cole, to subagents—all of which it was the contention of the Government was made in bad faith and for the sole purpose of procuring and forfeiting the deposits of money as soon as they were made.

"The circumstances of Cole and the Royal Publishing Company entering into contracts and promising the same territory to different persons at or about the same time and withholding from each that the territory was already occupied by another agent under a similar contract which had not expired was admitted in evidence as tending to show the scheme to defraud as set out in the bill of indictment, and as a circumstance tending to prove that Cole and the Royal Publishing Company were engaged in the business of forfeiting the deposits of such persons as could be induced to make them and sign the contracts as hereinbefore set forth, and as a further circumstance tending to show the intent of Cole, Holloway, and the Royal Publishing Company in procuring Bruce, Sherrouse, and Howell to sign said contract and forfeit the deposits which were respectively made by them was to defraud them and all other persons whom Cole and Holloway could induce to make de-
61 posits and sign similar instruments, and as such was left to the jury for what it was worth.

"It was further testified by the same witnesses and admitted in evidence that the Royal Publishing Company was engaged in precisely the same scheme as Cole. The contracts of the Royal Publishing Company with its agents were substantially the same as those which Cole made under the name of the Royal Publishing Company and as hereinbefore set forth.

The Government offered evidence tending to show "that Cole held out to each of said witnesses that he was the agent of the Royal Publishing Company, which he claimed was a wealthy corporation,

with its domicile in the city of St. Louis, Missouri; that Cole was 'established' by one W. R. Holloway, president of the Royal Publishing Company, as the agent of that company in Texas and Louisiana; that the Royal Publishing Company was controlled and managed by the said W. R. Holloway, who was its president; that Holloway established Howell in business at New Orleans in the same manner and under the same conditions that Cole subsequently established Bruce and Sherrouse at New Orleans; that all the contracts and dealings of Howell, Bruce, and Sherrouse were made under the name of the Royal Publishing Company—in the case of Bruce and Sherrouse, by Cole as agent of the Royal Publishing Company, and in the case of Howell, by Holloway as president of the Royal Publishing Company; that Cole was established by Holloway at Temple, Texas, long before Howell was established by Holloway at New Orleans as the agent of the Royal Publishing Company; that Howell was established before Bruce and Sherrouse; that before Holloway obtained from Howell the deposit which Howell made for the faithful performance of his contract and before any
62 contract had been signed by Howell, at the instance and solicitation of Holloway, Howell corresponded with Cole for information as to the character, nature, and value of the business; that, as a result of this correspondence and of the representations of both Holloway and Cole, Howell deposited $500 with the Royal Publishing Company and then signed the contract, the terms of which and the true nature of the business had been concealed from him by Holloway; that in the correspondence with Cole before he signed the contract Cole stated that he was engaged in the same business as he (Howell) proposed to engage in with the Royal Publishing Company; that Holloway, as Cole himself testified, was in Temple about the time Howell was corresponding with Cole concerning the Royal Publishing Company; all of which having been in evidence, the court admitted the evidence of the transactions between Holloway and Howell as circumstances tending to show the identity of the scheme of Cole and the Royal Publishing Company and as circumstances tending to show that Cole knew that Howell was acting under a similar contract in terms with that which was made with Bruce at the time he (Cole) was negotiating with Bruce and Sherrouse, and that Cole withheld this information from both Bruce and Sherrouse at the time they signed their respective contracts and made their deposits with him as agent of the Royal Publishing Company.

It was further offered by the Government and admitted by the court for the purpose of showing that the scheme of the Royal Publishing Company, which was identical with that of Cole under the name of the Royal Publishing Company, was a scheme to defraud and as a circumstance bearing upon the intent of Cole in inducing persons to sign these contracts and make deposits and afterwards in forfeiting the deposits so made.

To all of which evidence and to each portion and sentence
63 thereof the defendant, Cole, did then and there on the trial, when the same was introduced, object, on the ground, 1st,

that it tended to vary the terms of the written contract between the parties; (2nd) that there was no charge in the indictment that there was a contract giving to any one of these witnesses exclusive territory; (3rd) that the contracts themselves showed that the solicitor's guarantee contract had been supplied to each of these witnesses and that a copy was attached to the contract of the witness Sherrouse, and their evidence to the contrary was inadmissable; (4th) that as to the statements of the witness Howell the testimony was hearsay and such connection established between Cole and Holloway as would render it inadmissible; which objection, having been heard by the court, was then and there overruled; to which ruling of the court the defendant, Cole, did then and there in open court except, here tendering his bill of exceptions.

That it further appeared that Cole had not seen the contract between Howell and Holloway; that he did not know Howell, and the only connection, by correspondence or otherwise, between Cole and Howell was three letters written by Cole to Howell in February, 1892, to the effect that Cole considered the Royal Publishing Co. good for its contracts; that he was an agent of the company and was making money and believed that Howell would do well to enter the employ of the company and in general terms recommending the company to Howell in reply to a letter from Howell asking what the facts were.

64 *Bill of Exception No. 3.*

Be it further remembered that on the trial of the above numbered ans entitled cause the entire conversation between Holloway and Howell in New Orleans and *as* the contract, it having been proven by Howell, together with the statements of Howell, as testified to in bill of exception No. 2, were allowed to be introduced to the jury; that it did not appear that Cole had ever met Howell, but, on the contrary, the testimony showed that Howell and Cole were not acquainted, and Howell further testified that he had no contract or communication with Cole except the three letters referred to in bill of exception No. 2 and his letters to Cole which drew out from Cole the above replies; that Cole was under no obligation to him (Howell), but that all of his dealings were with Holloway or other persons purporting to represent the Royal Publishing Company; that Cole never promised to pay him anything, and that he had no claims upon Cole whatever except that Cole recommended the company, as shown by said letters, and stated that he was making money, or words to that effect; that the testimony of Howell was to the effect that Holloway told him in New Orleans, reiterating what he had told him in St. Louis, that he could have exclusive territory; that it was easy to carry out the solicitor's guarantee contract, and that the entire statements as set out in bill of exception No. 2 were gone over between Howell and Holloway in New Orleans as the same had been gone over in St. Louis; that he and Holloway put advertisements into the newspapers in advertising for solicitors under the solicitor's guarantee contract; that they

came and Howell and Holloway sat down at a table and the solicitors were allowed to come into the room one at a time, and they explained the contract to each solicitor, the solicitor fully understanding the terms of the solicitor's guarantee contract,
65 and when it was explained that the $15.00 was to be paid that they could not get a single solicitor under the terms of that contract; that Holloway finally came in with a telegram purporting to be from his wife, stating that some member of his family was violently ill; that Holloway had tears in his eyes, and asked him to relieve him from further attendance upon him in New Orleans, and that the contract should be carried out as it was explained to him verbally and according to every obligation contained in the written contract so far as it obligated the Royal Publishing Company; that Holloway left and he had never been seen by witness again, and his contracts were not complied with; that the witness paid three hundred and seventy-five (375) dollars on the books shipped to him, which he received, being the "Great Disasters" and "Wild Life on the Plains," and one hundred and twenty-five (125) dollars in fitting up the office, freight, and other expenses, making five hundred (500) dollars; that this contract was that he was to receive in return for this $500.00 books to that amount at the prices of the Royal Publishing Company, being forty per cent. off from the retail price at which the witness was to sell the books to actual readers who would buy from the solicitors taking employment under the solicitor's guarantee contract; that instead of shipping him $500 of books they shipped him some $893 of books at these prices, being $1,365 at the retail price, approximately; that he still retains these books, except one or two sold, and never returned them to the company.

(Notation by Judge Rector: Insert here bill of exception No. 4, by district attorney.)

Bill of Exception No. 4, by District Attorney.

It was further testified by the same witness that the money was so paid by the witness as a deposit to guarantee his good faith in executing the terms of the contract; that he did not return
66 the books because he did not consider them his books; that he had not purchased them from the Royal Publishing Company; never demanded them from him either through Mr. Cole or its president, Holloway, who had received the money from him, nor did the Royal Publishing Company return or offer to return the money he had deposited with them as a guarantee of good faith nor any part of it, and that the books were still in his possession and were unsaleable and valueless works and known to the trade to be what is called "fake books;" that none of these books prior to his making the deposit had been exhibited to him, and that he could not procure any solicitors to accept any contract with him under the terms of the solicitor's guarantee contracts; that Cole had written to him at the solicitation of Holloway that it was easy to procure

solicitors, and that he (Cole) himself was doing business with the Royal Publishing Company under the same character of contract which he (Howell) was proposing to make, and that he (Howell), acting upon the statements of Cole and the representations of Holloway, signed the contract and made the deposit; that after he discovered the fraud which had been practiced upon him by Holloway and the Royal Publishing Company he received a letter from Cole, in which Cole proposed to purchase the books from him (Howell), which proposal he rejected.

"Which testimony was offered by the Government and admitted by the court as a circumstance showing the intent of the Royal Publishing Company and Holloway and Cole, and that Cole had knowledge of the contract with Holloway, as president of the Royal Publishing Company, when he (Cole) was negotiating with Bruce and Sherrouse for substantially the same contract, and withheld his knowledge of the existence of the Howell contract and the negotiations of the Royal Publishing Company with Howell from Bruce and Sherrouse at the time he procured the deposit from Bruce and Sherrouse, and as another circumstance showing the identity
67 of the schemes of the Royal Publishing Company and Cole, all of which was left to the jury to be considered with other circumstances offered by the Government to prove the scheme to defraud and the intent of Cole, the defendant, in connection therewith.

In this connection Bruce and Sherrouse stated that one Taylor went to New Orleans and met each of them for the purpose of opening the office for each, under the assurance that Taylor would start them in business; that Taylor went to New Orleans and did open an office for Bruce, taking from Bruce a written statement, in evidence, which statement certified that Bruce was entirely satisfied with the acts of Taylor in opening the office, selecting furniture, and doing everything else Taylor promised. This was in writing on the trial. Sherrouse testified that Taylor came and authorized him to do all of this work, which was entirely satisfactory to Sherrouse, but that to each of these witnesses Taylor came and, with many complaints of his misfortune and regret at his condition, stated to Bruce that his child was dangerously ill and to Sherrouse that he himself (Taylor) was too weak to remain in New Orleans, it being evidence, however, by other witnesses—the physicians attending upon Taylor and his child—that at the dates stated by Taylor his child was dangerously ill, Taylor testifying that it died shortly after his return from New Orleans, and that Taylor himself was weak from a long spell of sickness and had gone to New Orleans on the occasion that he represented that he was sick against the advice of his physicians and was confined to his bed for five weeks just preceding his visit to New Orleans; that the testimony showed clearly that the representations of Taylor concerning the sickness of his child and himself were true.

68 (Notation by Judge Rector: Insert here bill of exception No. 5, by district attorney.)

Bill of Exception No. 5.

It was in evidence that Bruce and Sherrouse protested in diver- and sundry letters to Cole introduced upon the trial that Cole had not complied with any portion of the contract; that in the case of Bruce he had permitted Taylor to go because of his (Bruce's) sympathy for Taylor in his affliction at home and in the case of Sherrouse by his (Taylor's) claim that he was too ill to remain longer in New Orleans; that many letters passed betwe- Cole and Bruce and Sherrouse in which Bruce and Sherrouse constantly complained *to* of the failure of Cole to fit up the office and pay the expenses.

In connection with the testimony of Bruce and Sherrouse before the introduction of the testimony for the defence showing the sickness of Taylor and his child, Howell was permitted to testify to the conduct of Holloway with reference to the telegram and his statement that a member of his family was dangerously ill, and that at his earnest importunities Howell released him from remaining longer in New Orleans than was sufficient to select the office and show hi- how to conduct himself in instructing solicitors under the guarantee contract.

(Notation by Judge Rector: Insert here bill of exception No. 6, by district attorney.)

Bill of Exception No. 6, by District Attorney.

W. S. Howell testified that he knew W. R. Holloway and saw him sign the instrument, and that it was signed in duplicate, with F. L. Holloway, who was vice-president of the Royal Publishing Company, as a witness. Cole, when he testified in his own behalf, said that he knew Holloway's signature, and that the signature on the contract was Holloway's signature and that of the Rotal
69 Publishing Company, to which was appended a seal purporting to be the seal of the Royal Publishing Company; that he (Cole) did not know of the whereabouts of W. R. Holloway or his brother, L. F. Holloway, whose name is appended as a witness. Howell further testified that he did not know where W. R. Holloway was nor L. F. Holloway nor Russell Woolridge, who was secretary of the Royal Publishing Company; that he had made many and repeated efforts to ascertain their whereabouts and had failed to obtain any information in regard to the same.

To all of which testimony of Howell, reciting conversations between himself and Holloway in St. Louis and New Orleans, as set out in this bill of exception and bill of exception No. 2, the defendant objected to each and every sentence thereof for the following grounds:

1st. That there was no evidence before the court showing that Cole knew the contents of Howell's contract with Holloway, purporting to represent the Royal Publishing Company.

(2nd.) It appeared that a witness had signed the contract and

there was no evidence accounting for the absence of the testimony of this witness to prove the contract as at common law, and until this witness was accounted for the contract could not be admitted.

(3rd.) That the testimony and contract were hearsay, and no such connection established between Cole and Holloway as would render it admissible.

Bill of Exception No. 4.

Be it further remembered that on the trial of the above entitled and numbered cause the prosecution introduced a number of letters purporting to be signed by the Royal Publishing Company with a typewritten signature, there being no manuscript signature or seal to evidence the genuineness of the writing; that said letters
70 were addressed to the witnesses Howell and Bruce, and purported to be instructions to them from the company as to what they should do in the conduct of the business and how they should conduct it, and referring the witnesses to Cole as the agent of the Royal Publishing Company, and that Cole would explain the workings of the company to these witnesses. No evidence was introduced that these letters were actually signed by any one purporting to represent the Royal Publishing Company. They were written in response to letters written by these witnesses to the Royal Publishing Company, addressed to St. Louis, Missouri, and the letters in question, purporting to be from that company, also purported to be from the Royal Publishing Company.

(Notation by Judge Rector: Insert here bill of exception No. 7, by district attorney.)

Bill of Exception No. 7, by District Attorney.

The letters were written upon the usual letter-head of the Royal Publishing Company to its agents, and were in response to other letters written by the witness to the Royal Publishing Co., and were acted upon by Holloway and the Royal Publishing Company, and their genuineness was never denied in any conversation between Holloway, Howell, Cole, Sherrouse, and Bruce; and further testified that that was the usual mode of the Royal Publishing Company in signing their letters, and that there were a great number of letters received by the witness signed in that manner upon which Holloway, the president of the Royal Publishing Company, admitted that he had written them for the company, and there was no evidence to show that such letters should have received the corporate seal of the Royal Publishing Company or that the Poyal Publishing Company had any seal.

"It was shown in evidence that the Royal Publishing Company was a corporation organized under the laws of the State of Missouri,
and that W. R. Holloway and his brother, L. F. Holloway,
71 owned all of the shares of its capital stock; and it was further testified that the Royal Publishing Company in St. Louis

did not keep any stock of books on hand and were not publishers of books.

These letters were objected to on the ground that no signature or seal was attached to any one of these letters whereby there could be any evidence of the genuineness of the signature or that the letters were written by any one authorized to sign the name of the company, which and all of which objections the court overruled; to which ruling of the court the defendant Cole did then and there in open court except.

Bill of Exception No. 5.

The bill of indictment charged that Cole mailed a letter, of date June 17th, 1892, in furtherance of a scheme to defraud devised by him (Cole). The evidence of Howell showed that the scheme was devised, if by any one, by the Royal Publishing Company or Holloway or some one else than Cole.

(Notation by Judge Rector: Insert here bill of exception No. 7, by district attorney.)

Bill of Exception No. 7b.

The evidence tended to show that the scheme was in existence before he (Howell) was connected with it; that Cole had a contract and was connected with the Royal Publishing Company as its agent for a certain territory before Howell had any connection with the Royal Publishing Company, and that the scheme of Cole and the scheme of the Royal Publishing Company, through Holloway, were identical, and that his (Cole's) plan of procuring deposits and forfeiting them was precisely the same as that of the Royal Publishing Company, and that Cole acted nominally under the Royal Publishing Company as its agent, but in truth he acted for himself as to all of his transactions with his so-called sub-agents, road
72 agents, solicitors, etc., etc., and that the use of the name of the Royal Publishing Company was made to induce others to make contracts with him upon the idea that the Royal Publishing Company was a large corporation of publishers in a distant State and that Cole was an agent of that company, but that Cole was acting on his own account in all of his transactions with Bruce and Sherrouse, Floyd, and numerous other persons designated as "agents," road agents, and solicitors, but that the scheme was the same as had been practiced by the Royal Publishing Company acting through and by its president, one W. R. Holloway.

There was no evidence that Cole did devise the scheme, if a scheme, to defraud; that Cole became connected with the company as its agent at Temple after it had been incorporated and after it had been doing business through agents in its own name; that the letter charged to have been mailed was introduced in evidence and was shown to have been in furtherance of a scheme (whether to defraud or not) devised by the Royal Publishing Company; that

the indictment nowhere charged that the scheme was devised by the Royal Publishing Company, and that he, as accessory, was engaged in carrying out the scheme of the Royal Publishing Company.

The introduction of the letter was objected to on the ground (1) that the scheme*m* as shown by the evidence was at variance from the scheme as charged in the indictment, and (2) if it was sought to convict him of a scheme devised by another there was no allegation in the indictment that the scheme was devised by such other; (3) that the letter was mailed under a scheme admitted to have been devised before Cole became connected with it and not in furtherance of a scheme devised by Cole; which objections having been presented to the court were by the court overruled; to which
73 ruling of the court the defendant Cole did then and there in open court except.

Bill of Exception No. 6.

Be it further remembered that on the trial of the above numbered and entitled cause the witness F. L. Howell testified that Holloway told him that he (Holloway) had his books manufactured by Bectole & Co., of St. Louis.

(Notation by Judge Rector: Here insert bill of exception No. 7*a*.)

Bill of Exception 7a.

The witness F. L. Howell further testified that he was in the office of the Royal Publishing Company, in the city of St. Louis, in the State of Missouri, and that it did not keep any books such as it proposed to give to its agents; that all he saw there was Holloway and a large number of clerks and typewriters making out contracts, and that Holloway told him that the books were to be obtained from another house, known as Bectole & Co., whose place of business was near to that of the office of the Royal Publishing Company.

"Sherrouse and Bruce in their testimony stated that Cole told them in Temple before they signed any contracts that he himself was a publisher, and that as soon as their contracts were signed and their *their* deposits made he would ship the books from Temple to New Orleans; that after they had been established by Joe R. Taylor as the agent of Cole they waited for their books, and that their bill of lading showed that the books were sent from St. Louis, and bore the name of Bectole & Co., and that the books so shipped to them (Sherrouse and Bruce) were nothing like the books exhibited by Cole to them in Temple when Cole was soliciting them to sign their contracts; that Cole told them and each of them that they could dispose of $3,000 worth of their books inside of a month,
74 whereas Cole testified that his entire stock did not exceed $6,000 worth of books in his possession at any one time; that all of the books that were in the possession of Cole were in large cases and concealed from public view; that he had no print-

ing presses and binding establishment, and the witness understood from the conversation of Cole that the books were to be obtained from the Royal Publishing Company, a large corporation in the city of St. Louis, and that in the opinion of witnesses who had been for years selling and advertising books he, Cole, was not a publisher within the meaning of the term as known to the trade.

To which evidence the defendant did then are there object on the following grounds: (1.) The same was hearsay. (2.) It was immaterial in that it tended to illustrate no issue before the jury, unless upon the issue whether the Royal Publishing Company and Cole was a publisher of books, and as to this issue it was immaterial in that a publisher of books need not be a manufacturer of books, and tended to mislead the jury; which objections were overruled by the court; to which ruling of the court the defendant did then and there in open court except.

Bill of Exception No. 7.

Be it further remembered that on the trial of the above numbered and entitled cause a letter was introduced, bearing date June 17th, 1892, in terms the same as that set out in the indictment, which is here referred to, except that it contained the following variance, one paragraph reading as follows: "We experience no trouble whatever in securing plenty of good agents, as we guarantee them from $2.00 to $3.00 per day." Whereas the indictment charges instead of the word "them" — the word "then," being a mate-
75 rial variance between the letter and the indictment; upon which ground of variance the defendant Cole objected to the introduction of the letter, for the purpose of showing that such a letter was mailed, because of the variance; which objection was overruled by the court; to which ruling the defendant did then and there in open court except.

Bill of Exception No. 8.

Be it further remembered that on the trial of the above numbered and entitled cause the prosecution introduced divers letters from Cole to various parties, to wit, to J. P. Norcross, R. L. Drane, John D. Blakemore, S. Joban, and others, in substance stating that he (Cole) would allow them to open an office for him in New Orleans upon certain terms and conditions substantially the same as those set out in the contracts with Bruce, Sherrouse, and Howell, which contracts are copied in bill of exceptions No. 2.

(Notation by Judge Rector: Here insert bill of exception No. 8, by district attorney.)

Bill of Exception No. 8, by District Attorney.

"The letters received by Norcross, R. L. Drane, John D. Blakemore, and S. Jobin were in substance as follows:

TEMPLE, TEXAS, *August* 13, 1892.

DEAR SIR: In reply to yours to lock-drawer E will say we are in the subscription business, and desire opening a branch office in your section of the country so as to further extend our business.

We want an active, energetic man as manager of this office, and to the proper party we will pay a salary of one hundred dollars per month, payable at the end of each and every month, and in addition to this we will allow you a commission of ten per cent. on all
76 goods sold from your department. It is not absolutely necessary that you should have any previous experience in this line of work, for if we engage you we will send an experienced man to open up the office and show you how to conduct the business. We furnish the office and pay all expenses of running same, including clerk hire when it is needed. We require the manager to carry part of the stock of the office which it is necessary to keep on hand for the purpose of supplying your agents working from your department. We require you to carry part of this stock not only as a matter of security, but that you may have financial interest in the business, knowing that if you have this financial interest you will be very much more careful in the matter of credits and collections and will work much harder than you would otherwise.

In order to protect you against loss we agree to take back any and all books that you may have on hand at the expiration of the agreement. We do not like to make a contract for less than a year.

Our books are the most popular and rapid-selling in the country and are sold only on subscription through canvassers. We have every reason to believe that you can sell from two to four thousand dollars' worth per month after you are fairly started in the business, thus giving you a handsome income.

Your duties as manager will be strictly confined to office-work, such as employing traveling men and canvassers, making contracts with sub-agents, corresponding, circularizing, advertising, etc.

We are anxious to open this office as soon as possible, and if you should think favorably of the matter we request that you come to Temple at once and bring references with you, also funds, prepared to close the contract while here so there will be no delay.

Wire us when you will be here so we will be prepared to show you proper attention on arrival.

77 So far as the capital on your part is concerned, you will be perfectly secure.

Yours truly, W. A. COLE.

It was testified by Bruce and by Sherrouse that after they discovered that Howell was acting under the same contract with the Royal Publishing Company as they were (Sherrouse and Bruce) under Cole in order to test the good faith of Cole they procured these persons to answer the advertisement of Cole, and the letters of Cole to the said Norcross, R. L. Drane, John D. Blakemore, and S. Jopin were received in response to their propositions. These letters were offered by the Government and admitted by the court as additional circumstances to show that Cole and the Royal Publishing Com-

pany were engaged in the business of procuring deposits from other persons upon the same conditions and circumstances as he had procured them from Bruce and Sherrouse and also as a circumstance tending to show the intent of Cole and the Royal Publishing Co., the said letters having been written to these persons before the expiration of the pretended contracts of Cole and the Royal Publishing Company with both Bruce and Sherrouse and before Bruce and Sherrouse had any opportunity to test the same, and were admitted, among other circumstances, for the purpose of illustrating the scheme to defraud which was set forth in the bill of indictment.

To which letters of these various parties and to each of them the defendant Cole objected on the grounds, 1st, that the same were addressed to third parties, who were not shown to
78 have taken any part in the scheme to defraud (if any); (2nd) there was no exclusive territory granted to any witness, and these letters, if they had been perfected into a contract between the parties, would not have illustrated any issue before the jury except as to exclusive territory; (3rd) they were decoy letters, not written in good faith, but intended only to entrap the defendant into making propositions for their employment by him to be used as evidence by B. F. Sherrouse in his effort to evade the contract of purchase between him and Cole; which several objections the court overruled; to which ruling of the court the defendant Cole did then and there in open court except.

Bill of Exception No. 9.

Be it further remembered that on the trial of the above numbered and entitled cause the witness Howell testified that the Royal Publishing Company did not pay him $100 per month, and that Cole did not pay him $100 per month; that he had not received from Cole any part of the money he had paid upon entering into the contract with the Royal Publishing Company; to which testimony the defendant objected on the ground that it was not shown that Cole was under any obligation to pay Howell any sum, his contract having been made with the Royal Publishing Company by Holloway without the knowledge or participation of Cole, further than that Cole answered a letter of Howell's, stating that he believed that he could make money by entering the employ of the Royal Publishing Company, before Howell did actually enter its employ, and (2nd) because Cole had never seen the contract or become in any way obligated to Howell, further than in giving the above
79 advice; which objections the court overruled; to which ruling of the court the defendant did then and there in open court except.

Bill of Exception No. 10.

Be it further remembered that on the trial of the above numbered and entitled cause the defendant introduced W. B. Floyd.

(Notation by Judge Rector: Insert here bill of exception No. 9, by district attorney.)

Bill of Exception No. 9, by District Attorney.

W. B. Floyd testified that he had a contract with Cole covering a certain portion of territory in Texas, and testified as to his experience under that contract, which was in terms the same as that of Bruce and Sherrouse, set forth in bill of exception No. 2; that he did not work long under this contract, and that he afterwards made a new contract substantially different from the one he had first entered into. He called that the "commission contract."

"The court permitted him to testify as to all of his dealing under that contract, which in substance was the same as that of Bruce and Sherrouse, but refused to permit him to testify to the transactions under the commission contract."

That Floyd knew several persons who had worked for Cole under the solicitor's guarantee contract, & that they had completed their work under the contract and were satisfied with the contract, and that they either made $3.00 per day out of their commissions or the difference between three dollars per day and the amount received as commission was paid to such solicitors by Cole; that some of these persons had received more than $3.00 per day out of commissions and some had not, and these last had been paid the full amount of $3.00 per day for each day and were satisfied with their contracts.

That these facts were known to him by association with
80 *the* persons, and that by their representations as above set out he was led to go to Temple to see Cole and make a contract with him; which evidence was objected to by the Government as hearsay and irrevelant and the objection sustained, and the court ruled that the defendant would not be and was not allowed the testimony of the said witness to establish the above fact; to which ruling of the court the defendant did then and there in open court except.

Bill of Exception No. 11.

The defendant, Cole, after identifying the books "Great Disasters," "Wild Life on the Plains," and a book "Columbus and Columbia," showed by the witness W. B. Floyd that these books were amongst the books offered for sale by Cole; that Cole had a large stock of books on hand, amounting to about $6,000.00 worth, which at retail would be about $10,000.00 worth; that the books so identified were a part of the stock carried by Cole and were copies of these several publications, and the defendant proposed to show the contents of the books and extracts from the contents and the title page of the books for the purpose of showing the character of the publications and that they were instructive, interesting, and elevating in tone, to illustrate the issue of whether they were saleable, and that the evidence would have shown that "Wild Life on the Plains" was written in part by General Custer and was an autobiography of General Custer; that "Great Disasters" contained descriptive historical narratives of floods, earthquakes, and disasters of the world's history, and that "Columbus and Columbia" contained four essays of value as

literary productions as well as of historical interest; to which
81 evidence the Government, by her district attorney, objected; which objection was sustained by the court. Whereupon the court ruled that the defendant, Cole, would not be entitled to the above testimony; to which ruling of the court the defendant — then and there in open court except.

Bill of Exception No. 12.

Be it further remembered that the court charged the jury that if there was a scheme to defraud it will be looked for in this case in the fact that the general agents were to get a salary of $100.00 per month, besides commissions, and that it practically was to come largely out of the deposits of $15.00 to be made by each agent and solicitor employed by the general agent, of which there was to be so employed by each general agent ten a month; to which charge of the court the defendant objected, because (1st) as a matter of fact the written contract showed that the general agents had no promise or obligation from Cole or the Royal Publishing Company to receive $100.00 per month, besides commission, nor that it was to come out of the deposit of $15.00 to be made by the solicitors employed by the general agent, but, on the contrary, the contract bound Cole to pay $10 for each agent employed, and this was a personal obligation; (2nd) if the above charge is not obnoxious to the first objection, then it is certain that the same was misleading and did not submit to the jury the real issue, which was as to whether or not the scheme to defraud arose out of the real terms of the guarantee contract referred to in the later charge of the court contained in the same paragraph, wherein the jury are instructed that if the defendant concealed the nature of the guarantee contract from the general agent and particularly the requirements therein that each solicitor was to deposit $15.00 with him as a prerequisite of his (the soli-
82 itor's) employment until after such general agent had deposited with the defendant Cole $500.00 or $600.00, and such concealed requirement destroyed his ability to go on with his contract and resulted in the forfeiture of his $500 or $600, and that such result was designed by Cole, in which event they should find a scheme to defraud, the two portions of the paragraph being misleading and not responsive each to the other, inconsistent, and tending to mislead the jury.

Bill of Exception No. 13.

Be it remembered that the court further charged the jury that if there was no concealment by Cole from the general agent — the solicitor's contract, and particularly of the requirement of $15.00 to be paid by each solicitor and road agent, if the contracting agent inspected or had a fair chance to inspect their contracts before depositing their money that there was nothing on the face of the contracts necessarily implying a scheme to defraud, and if a scheme to defraud existed on the part of defendant it is to be found in the

mode and plan of carrying on the business as indicated above and not in the contract set up; to which charge of the court the defendant objected on the ground (1st) that by the use of the word "necessarily" the minds of the jury were left to supply what the terms of the charge did not give in explicit language, as to the construction by the court of the terms of the contract, or the scheme to defraud or the evidence necessary to show such scheme; 2nd the last clause in the charge, which proceeds further to say if a scheme to defraud existed on the part of defendant it is to be found in the mode and plan of carrying on the business as indicated above and not in the contract set up, because the court nowhere states
83 the mode and plan of carrying on the business such as would show to the jury the views of the court as to what would constitute in law a scheme to defraud; which objections of the defendant Cole were overruled by the court; to which ruling of the court the defendant did then and there in open court except.

Be it further remembered in this bill of exception that nowhere in the charge did the court set up a mode and plan of carrying on the business, and that the words as indicated above refer to no particular charge actually found in the charge of the court, the full text of the charge being as follows, to wit:

84 UNITED STATES
vs. } 296.
WILLIAM A. COLE.

The jury are instructed as follows:

The indictment charges that the defendant devised a scheme to defraud, to be effected by him in the name of the Royal Publishing Company, by opening and intending to open correspondence with vari-us persons — means of the post-office establishment of the United States and by then and there inciting such persons to open correspondence with him in his own name and in the name of the Royal Publishing Company by and through the United States mail. The indictment further charges that in executing said scheme or artifice the defendant placed and caused to be placed in the post office at Temple, Texas, a letter, the envelope of which was directed to B. F. Sherrouse in words and figures as follows, to wit: Mr. B. F. Sherrouse, 520 Magazine St., New Orleans, La. Then following the letter fully set out upon which the indictment in this case is founded.

2. The indictment then, by way of inducement, sets out substantially the contract that the defendant, in the name of the Royal Publishing Company, made with some of the general agents employed by him, and then charges that Cole, the defendant, as part of the fraudulent scheme charged in the indictment, consealed from persons solicited to become general agents the real terms of the "solicitor's guarantee contract" required to be obtained by general agents as a condition precedent to their receiving any salary from W. A. Cole under the name of the Royal Publishing Company, and falsely represented to the persons solicited to become general

agents that the said solicitor's guarantee contract required no
85 *no* deposit of money from the solicitors to be employed by such general agents; that having obtained from the person-solicited to become general agents large sums of money for the right to become such general agents and on account of the stock of goods, to wit, books and publications from the Royal Publishing Company, which were to be sold by such general agents by means of the solicitors to be employed under the solicitor's guarantee contract, and after having induced such persons to become general agents the said W. A. Cole would then and there demand and receive large sums of money, to wit, $600.00, from each of said general agents as a deposit and guarantee of good faith on the part of the general agent to carry out the terms and conditions of the employment, and after such deposits had been made by such agents with him he, the said Cole, under the name of the Royal Publishing Company, would then show and deliver to the person so solicited and engaged as general agent the form of the solicitor's guarantee contract required of such agents to obtain from the solicitors to be employed by them, and without obtaining ten of which solicitors each month such general agents were not entitled to receive the sum of $100.00 per month, as stipulated in his contract with the Royal Publishing Company, or any other sum.

That by the terms of the solicitor's guarantee contract, which the general agents were required to use in making contracts with solicitors, each road agent and solicitor had to deposit with the general agent $15.00 as a guarantee of good faith and for an outfit to work, and that out of this $15.00 deposit of the solicitors employed by the general agent he has to get his salary of $100.00 per month,
86 and that, while the solicitor's guarantee contract pretented the $15.00 was to be paid back to the agent depositing it, the said Cole intended that no part of it should be paid back to the party depositing it; that said Cole well knew that solicitors and road agents could not be obtained under the terms of the solicitor's guarantee contract by general agents.

2*a*. The indictment further charges that "the said scheme devised by defendant Cole was not in truth and in fact intended as a plan to dispose of a stock of books belonging to himself, but that the same was a scheme to extort money from such persons as he, the said W. A. Cole, under the name of the Royal Publishing Company, might and could induce to become general agents for the sale of certain worthless and valueless and unsalcable books and publications at prices fixed by him, the said defendant, under the name of the Royal Publishing Company, so high that the same could not be sold by the solicitors and road agents under the solicitor's contract."

Was it a false scheme and plan devised not for the sale of books, but to entrap people to become general agents and deposit large sums of money with Cole, the defendant, which was not returned or intended to be returned to such general agents, or was the plan or scheme an honest one to sell books through agents? That it was a bad plan or poorly adapted to effect and carry out a successful

business, if such was the case, would not make it a scheme to defraud if it was honest; but if the leading purpose of the plan was to get possession of large sums of money from general agents and appropriate it dishonestly, then the scheme was one to defraud.

2*b*. The form of the contracts made with the general agents *are* in evidence before you; also the form of the solicitor's guar-
87 antee contract. It seems to the court that if there was a scheme to defraud it will be looked for in this case in the fact that the general agents were to get a salary of one hundred dollars per month, besides commission, and that it practically was to come largely out of the deposits of fifteen dollars to be made by each agent and solicitor *agent and solicitor* employed by the general agent, of which there was to be employed by each general agent ten per month. Now, if defendant concealed the nature of the solicitor's guarantee contract from such general agents, and particularly the requirements therein that each solicitor was to deposit $15.00 with him, the general agent, as a prerequisite of his, the solicitor's, employment until after such general agent had deposited with the defendant, Cole, $500.00 or $600.00, and such concealed requirement destroyed the capacity of the general agent to go on with his contract and resulted in the forfeiture and loss of his $500.00 or $600.00, and that such result was designed by defendant, then we think the jury could properly find that there was a scheme to defraud; but if there was no such concealment by Cole from the general agents of the solicitor's contract, and particularly of the requirements of $15.00 to be paid by each solicitor and road agent; if the contracting agents inspected or had a fair chance to inspect their contracts before depositing their money, then there is nothing on the face of the contracts necessarily implying a scheme to defraud; and if a scheme to defraud existed on the part of defendant, it is to be found in the mode and plan of carrying on business as indicated above and not in the contract set up.

88 3rd. If the Royal Publishing Company of St. Louis had concocted a scheme to defraud and said scheme was the same as that charged in the indictment, and the defendant knowing such scheme connected himself with it and under the name of the Royal Publishing Company in executing said scheme sent out letters and pamphlets through the post office, then in the eye of the law he devised said scheme.

4th. If the defendant sent the letter set out in the indictment through the post office in execution of a scheme to defraud devised by him and to be effected by opening a correspondence with any person by means of the post-office establishment of the United States, then it would make no difference whether the letter disclosed the scheme on its face or was innocent or harmless on its face.

5th. You are the exclusive judges of the evidence, notwithstanding any opinion expressed by the court, and you will regard all the evidence the court has admitted touching the deposit of money by various persons other than Sherrouse and the contracts of other persons than Sherrouse as general agents with the defendant or with the Royal Publishing Company through Cole as agent and ad-

mitted solely for the purpose of enabling the jury to determine whether the defendant had concocted a scheme to defraud or was carrying on business of a book dealer in good faith, and as bearing on the question whether there was or was not a scheme to defraud the contracts with general agents other than Sherrouse made by defendant are to be considered as well as that with Sherrou-.

6th. The defendant has shown a good character in Temple for honesty; good character is no defence if the testimony satisfies you that the defendant is guilty. It is only where the testimony leaves the minds of the jury balanced or in doubt as to the guilt of the defendant that good reputation is to be taken in consideration
89 by the jury as affording a presumption in favor of innocence.

7th. If you have reasonable doubt as to the guilt of the defendant you will acquit him. If you find the defendant guilty you will say: We, the jury, find the defendant guilty as charged in the indictment.

JOHN B. RECTOR, *Judge.*

Bill of Exception No. 14.

The court further charged the jury that if the Royal Publishing Company had concocted a scheme to defraud such as was charged in the indictment, and the defendant knowing the scheme connected himself with it and under the name of the company in executing the scheme sent out letters and pamphlets through the post office, then in the eye of the law he devised the scheme; to which charge of the court the defendant objected because—

(1st.) The indictment charged that Cole devised the scheme, and proof that the scheme was devised by some one else was a variance and would not support a conviction under the charge.

2nd. It was immaterial to prove a scheme devised by some one else unless the indictment charged that under a scheme devised by another, either known or unknown, Cole had mailed the letter in question, since he could not be convicted, as the indictment charged that he devised the particular scheme under which he was at bar for trial, and he was not charged as an accomplice, acces-ory, or principal in carrying out the scheme of another.

Bill of Exception No. 15.

Be it further remembered that the court charged the jury that if there was a scheme to defraud, and the defendant sent out the letter set out in the indictment in the execution of the scheme, it
90 would be immaterial that the letter itself on its face was innocent; to which charge the defendant Cole objected because—

(1st.) There was no proof that the letter described in the indictment was mailed, there being a variance between the letter charged in the indictment to have been sent and the letter introduced in the evidence as having been the letter which was actually sent, and (2nd) because if the letter itself was innocent there was no misuse

of the mails or violation of the law; which objection was overruled by the court; to which ruling of the court the defendant did then and there in open court except.

Bill of Exception No. 16.

The court in paragraph five of his charge attempted to control the evidence introduced for the purpose of illustrating the scheme to defraud, to which paragraph, as set out in the bill of exception No. 13, reference is here made for ab-reviation of this bill, and bill of exception No. 13 is made a part hereof for that purpose; that this charge was given by reason of the fact that Howell had testified to facts and circumstances occur-ing between Holloway and himself; that Cole was not shown to have been connected with these circumstances except by way of letters to Howell before Howell entered into his contract with the Royal Publishing Company, and it did not appear from the evidence that Cole had ever seen Howell's contract or in any manner co-operated with the Royal Publishing Company in defrauding Howell, if he was defrauded.

That Howell's contract differed from the contracts made by Cole for the reason that Cole had supplied to Bruce and Sherrouse and other agents established by him full explanations and copies of the several contracts, all of which made the scheme as developed by Cole differ from the scheme as developed by Howell and Holloway. This evidence having been introduced and the charge above referred — as having been given by the court, the defendant ob-
91 jected thereto because this charge should have guarded the evidence of Howell as to his contract with Holloway, and should have instructed the jury not to convict Cole upon that evidence or to consider it unless they should find that Cole knew that such scheme and contract was being perpetrated upon Howell by Holloway or in some manner was connected with or co-operating in the scheme, having knowledge of the contract with Howell or representations made by Holloway to him.

Bill of Exception No. 17.

The defendant Cole proved a good character, as shown by the charge of the court, in charging upon which, however, the court instructed the jury not to consider it unless the testimony left the minds of the jury balanced or in doubt as to the guilt of the defendant; to which charge of the court the defendant objected on the ground that in event of such doubt the jury would be required to acquit under the next charge of the court, instructing them to give him the benefit of the doubt, and that the effect of the two charges was to withdraw from the jury all benefit to be derived by the defendant from the proof of good character, which was so complete that the court ruled that no further testimony upon that issue should be admitted; which objection to the charge of the court were overruled; to which ruling the defendant then and there in open court excepted.

It is here stated that numerous witnesses testified to the good character of the defendant in the city of Temple, where defendant lived, for honesty, and that about fifteen or twenty witnesses were introduced, when the court ruled that the fact was established and no other evidence would be heard upon that issue.

Bill of Exception No. 18.

The court failed to present to the jury what phase of the
92 evidence would entitle them to acquit the defendant; for which presentation reference is here made to the full text of the charge contained in bill of exception No. 13.

The testimony of the defendant tended to show that he made a full explanation of the whole plan of his business to the parties, Bruce and Sherrouse and other agents, and that he was in the general book business, establishing agents and selling through agents and through his home office at Temple; that to Bruce a full explanation was given in February, 1892, of the solicitor's contracts & road agent's contracts, & later on, in April, 1892, a full explanation of the general agent's contract; that he was shown through the office and given every opportunity of investigating the business for himself; that substantially the same full explanation was given to Sherrouse, and that the defendant explained the solicitor's guarantee contract and all about the $15.00 and the purchase of the books, their value and price; that he was in the general book business and desired agents to aid him in selling; that the defendant sold large amounts of books in small shipments through the express office and large shipments through the freight office to various parties over Texas and in adjoining States; that this business resulted in his shipping *in* very large consignments of goods and shipping them out frequently; that the express receipts in evidence showed that he had numerous customers all over the State; that his theory of the defence was that he was in the general book business; that he had been successful in his business in the sale of books and the establish- of general agents; that only Bruce and Sherrouse were shown to have been dissatisfied as general agents with any contract made by Cole, and that Howell was the only agent dissatisfied with his work by contract through the Royal Publishing Company; that he had established a large number of such agents, no one else of whom had made complaint; that the theory of
93 the defence was that by reason of the foregoing facts he was in the book business as a publisher, as that word is defined by Webster, for the distribution and sale of books; that if this theory were true and that his scheme was not one to defraud, but to sell books in a *bona fide* business before the public, that he was entitled to a verdict of not guilty; which issue was not presented to the jury under any charge of the court, but, on the contrary, in this connection, the jury were instructed merely that a scheme to defraud might be found by them if the mode and plan of carrying on the business as indicated above should be developed by the evidence without saying what mode or plan of carrying on the business was

meant by the court; to which charge of the court and failure to present the theory of the defence the defendant Cole did then and there in open court except.

The foregoing bills of exception having been prepared by the defendant Cole and presented to the court on this the 8th day of May, 1893, within the time allowed by the court to present the bills of exception to the judge, in vacation, and having been examined are in all things approved.

In testimony whereof witness my official hand this 31st day of July, 1893.

(Signed) JOHN B. RECTOR,
Judge of the United States District Court,
Northern District of Texas.

Filed Aug. 7, 1893.

J. H. FINKS, *Clerk,*
By C. A. RICHARDSON, *Deputy.*

94 *Application for Extension of Time.*

W. A. COLE *vs.* UNITED STATES. } On Writ of Error from U. S. District Court for Northern District of Texas.

JUNE 2, 1893.

To the Hon. John B. Rector, United States district judge:

Your petitioner, Wm. A. Cole, with respect represents that on May 31st, 1893, citation in error issued on writ of error to the Supreme Court of the United States in the above cause; that the record is voluminous and has not yet been prepared; that your petitioner, the plaintiff in error, has exercised all possible diligence in having the same prepared; that it will require about sixty (60) days longer to prepare the same and file it with the clerk of the Supreme Court of the United States.

Wherefore your petitioner prays that the time for return of the writ of error and citation herein and for filing the same and for filing transcript be enlarged until September 1st, 1893.

JNO. L. DYER,
WILLIAMS & EVANS,
Attorneys for Wm. A. Cole.

Order Extending Time.

W. A. COLE *vs.* UNITED STATES. } On Writ of Error from U. S. District Court for Northern District of Texas.

JUNE 2, 1893.

On this day came on to be heard the application of Wm. A. Cole, plaintiff in error, asking that time be enlarged until September 1st, 1893, within which to return the writ of error and citation and to file the same, with the transcript thereon, in the Supreme Court of